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Corruption and Law in Indonesia

Simon Butt

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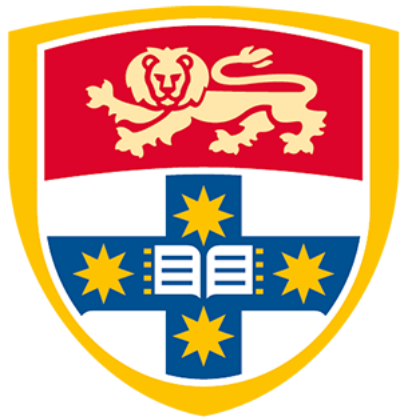

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Corruption and Law in Indonesia

Indonesia has transformed from one of Southeast Asia's most repressive and centralised political systems to its most decentralised and democratic. Despite this, obstacles still remain that hinder Indonesia achieving the 'rule of law', and in particular, the country is consistently ranked as having one of the highest levels of corruption in the world. This book assesses Indonesia's anti-corruption reforms over the past decade, focusing on the Anti-Corruption Commission (KPK) and the Anti-Corruption Court (ACC).

The book discusses how both institutions have been largely successful since they began operating in 2004. Before 2008, the KPK and ACC largely focused on mid-senior level targets and faced resistance primarily in the form of constitutional challenges to their jurisdictions and powers. From 2008, however, the KPK began targeting politically powerful figures, drawing resistance that now threatens the future efficacy of both institutions. It is largely in Indonesia's courtrooms and lawmaking institutions that key battles between reformists and those preferring the status quo have played out. This book describes and analyses these judicial processes and legal changes. It shows that despite persistent claims that Indonesia's legal system is dysfunctional, law is far from irrelevant in modern-day Indonesia. The book is an important and original contribution to Southeast Asian politics and Asian law.

Simon Butt is Senior Lecturer at the University of Sydney, Australia, where he teaches Indonesian law, intellectual property, dispute resolution in Asia, and law and investment in Asia. His research and consultancy interests include lawmaking, policy and law, corruption, Islamic law, human rights law, the judiciary, the rule of law and the legal implications of regional autonomy in Indonesia.

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Glossary and commonly used Indonesian words

In this book, I have used many abbreviations. I have prepared two tables to help readers navigate the text. The first is a table of abbreviations that I use regularly – at least several times in most chapters. The second is a list of less commonly used abbreviations and translations of Indonesian words.

Commonly used abbreviations

Abbreviation	*English equivalent or translation*	*Indonesian*
ACC	Anti-Corruption Court	Pengadilan Tindak Pidana Korupsi
ACCL	Anti-Corruption Court Law	Undang-undang tentang Pengadilan Tindak Pidana Korupsi
ACL	Anti-Corruption Law	Undang Undang tentang Pemberantasan Tindak Pidana Korupsi
ICW	Indonesia Corruption Watch	
KPK	Anti-Corruption Commission	Komisi Pemberantasan Korupsi
MK	Constitutional Court	Mahkamah Konstitusi
SBY	Susilo Bambang Yudhoyono (the Indonesian President)	

Other abbreviations and Indonesian words

Abbreviation	*English equivalent or translation*	*Indonesian*
BDNI	Indonesian National Bank of Trade	Bank Dagang Nasional Indonesia
BKN	National Auditing Body	Badan Keuangan Negara
BLBI	Bank Indonesia Liquidity Assistance	Bantuan Likuiditas Bank Indonesia
BPK	Supreme Audit Agency	
DPR	Indonesia's national legislature	Dewan Perwakilan Rakyat
Golkar	Name of political party, formerly Soeharto's parliamentary vehicle	Golong karya
KPKPN	Commission for the Inspection of State Officials' Assets	Komisi Pemeriksa Kekayaan Penyelenggara Negara
MA	Supreme Court	Mahkamah Agung
PDI-P	Indonesian Democratic Party of Struggle	Partai Demokrasi Indonesia Perjuangan
PPATK	Financial Transactions Reporting and Analysis Centre	Pusat Pelaporan dan Analisis Transaksi Keuangan
PPP	United Development Party	Partai Persatuan Pembangunan
Rp	Rupiah (Indonesian currency)	Rupiah
SKPP	Cessation of Prosecution Order (issued by prosecutors)	Surat Ketetapan Penghentian Penuntutan
SP3	Cessation of Investigation Orders (issued by police)	Surat Perintah Perhentian Penyidikan
Tipikor	crime of corruption	tindak pidana korupsi
	unlawful act	perbuatan melawan hukum
	suspect	tersangka
	defendant	terdakwa
	formally dropping a case	deponering

Introduction

Post-Soeharto Indonesia now stands at a critical juncture. Many defining characteristics of Soeharto's 32 years of authoritarian rule have been discarded. Indonesia has transformed from one of Southeast Asia's most repressive and centralised political systems to its most decentralised and electorally democratic. Yet, well over a decade after Soeharto's fall in May 1998, reformers have been unable to dislodge one of his enduring legacies: corruption. Indonesia is often said to have corruption levels amongst the highest in the world. On the Transparency International Corruption Perceptions Index, Indonesia placed 110th of 170 countries in 2010.[1] Corruption is said to be engrained within all tiers of government – national, provincial, city, municipality and village. Many of its institutions, including its national parliament and courts, rank amongst the most corrupt in Asia (Diansyah 2009). All this leads Emmerson (2010) to describe Indonesia as both the most democratic *and* the most corrupt country in the region.

These high corruption levels cannot, however, be attributed simply to a lack of attempted reforms. During Soeharto's reign, numerous institutions and working groups were established, ostensibly to reduce or eradicate public-sector corruption. However, they failed to dent corruption levels: entrenched Soeharto-era practices permitted – perhaps even encouraged – government officials to extort bribes. Most post-Soeharto anti-corruption reforms and institutions have fared no better. They have faced stiff resistance from government officials – executive, legislative and judicial – seeking to maintain the status quo: a system which provides legal impunity to most corrupt officials. For the most part, police, prosecutors and courts – the so called justice-sector mafia (*mafia peradilan*) – have perpetuated the corrupt practices of officials by themselves taking bribes in return for dropping investigations, presenting sloppy prosecutions and issuing light sentences or acquittals.

By 2003, however, the tide began to turn. Established in that year were two new anti-corruption institutions: the Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*, or KPK) and the Anti-Corruption Court (*Pengadilan Tindak Pidana Korupsi*, or ACC). Conceived during the *reformasi* fervour of the post-Soeharto period, the KPK and ACC 'team' were designed to take particular types of corruption cases beyond the reach of this mafia.

The KPK is institutionally independent of government. It can investigate and prosecute most corruption cases itself and can take over corruption investigations and prosecutions from police and prosecutors. It has investigative powers that the police do not. For example, it can wiretap suspects' phones without seeking court approval, freeze bank accounts and issue travel bans. The KPK is also restricted in ways that ordinary police and prosecutors are not. For example, once the KPK names a person as a suspect (*tersangka*) – which is equivalent to 'charging' that suspect – the KPK must proceed to trial, even if subsequent evidence shows that the suspect is innocent. The purpose of this mechanism is to preclude KPK officers being bribed to drop a case before trial.

The ACC – a branch of the general court – was established solely to try cases the KPK prosecutes. Unlike the general courts, where three career judges sit on most panels, the ACC was designed with five-judge panels, comprising two career judges drawn from the general courts and three so-called ad hoc judges. These are legal experts, usually academics, practitioners and retired judges, employed to sit on ACC trials. The rationale for their inclusion was that, because they work outside the existing, largely corrupt judiciary, they were less likely to seek or accept bribes to fix the outcomes of cases. Appeals were available to similarly constituted benches in high courts and the Supreme Court.

These innovations have been immensely effective. At all levels – at first instance and on appeal – ACC panels had, at time of writing, maintained a 100 per cent conviction rate in almost 150 decided cases.

The KPK and ACC 'team' has not, however, escaped sustained criticism. As for the ACC, well-regarded lawyers, some of whom represented defendants in ACC trials, have claimed that the court must have ignored the presumption of innocence to maintain its conviction rate, pointing to 'secret' meetings between ad hoc judges and KPK officers. Reformists such as Indonesia Corruption Watch (2008) have complained that its sentences – on average, around four years' imprisonment – were lenient, particularly when imposed on defendants convicted for siphoning very large amounts of public funds. After all, reformists emphasised, the 1999 Anti-Corruption Law allows judges to impose life imprisonment, even the death penalty, for such crimes.

As for the KPK, some senior politicians publicly rebuked it for pursuing public officials so vigorously that they had become reluctant to perform the functions for which they were employed. Officials were said to be concerned that the KPK would investigate, as corruption, errors they made when performing their functions, particularly if procuring goods or services. They feared being targeted for any losses their actions or inactions caused the state, even absent evidence of embezzlement or personal enrichment.

Reformists expressed disappointment with the KPK for very different reasons. They claimed that the KPK chose only 'easy' cases it was virtually assured of winning, rather than going after the 'big fish' – including Soeharto, his family and inner circle, senior military personnel, and those involved in the bank liquidity scandals in the aftermath of the 1997 financial crisis.

These reformist critiques of the KPK's case selection were largely sustainable, at least until 2008. Though the KPK did successfully target some former ministers and senior local government officials – including former Aceh Governor Abdullah Puteh in its first case – most convictions were of bureaucrats and local politicians. Rather than demonstrating lack of intent, however, the KPK's case selection probably reflected an acute awareness of the pushback the KPK anticipated it would encounter when targeting more politically powerful figures. Early over-enthusiasm would likely have drawn resistance from the so-called 'big fish' – resistance that might have overwhelmed the Commission. Starting with smaller cases allowed the KPK to build momentum, experience, expertise and public support, before tackling the cases reformists highlighted.

Strategic case selection proved prudent. Resistance was significant but manageable during the Commission's first years. During this period, resistance largely played out in the Constitutional Court. This court, also established in 2003, tests the constitutionality of statutes. If it decides that a statute contradicts the Constitution, it can invalidate that statute. This is a significant power, particularly because Indonesia's Constitution now includes a world-class catalogue of human rights. Several people the KPK prosecuted and the ACC convicted lodged challenges with the court. They objected to the statute that established the KPK and the ACC (the 2002 KPK Law) and the 1999 Anti-Corruption Law under which they had been convicted. They argued that both statutes contravened their constitutional rights.

Three key challenges were successful. In one case, the Constitutional Court decided that a particular definition of corruption in the 1999 Anti-Corruption Law was too wide, thereby causing 'legal uncertainty', which was contrary to the Constitution. Fears that this would make some types of corruption harder to prove were unfounded: the ACC has, in practice, employed inventive legal reasoning to get around this decision. In another case, the Constitutional Court declared that if the KPK attempted to investigate a crime that was committed before the KPK itself was established, the KPK would breach the Constitution's prohibition on laws of retrospective operation.

In a third case, the Constitutional Court found that the ACC was unconstitutional. According to the Constitutional Court, upon the ACC's establishment, a 'dual' system for corruption cases was created. The general courts continued to hear the cases that the KPK decided not to pursue. This, the Constitutional Court decided, undermined the constitutional principle of equality before the law. Implicit in the Constitutional Court's reasoning was that general courts did not maintain conviction rates similar to those of the ACC, to the disadvantage of defendants the KPK chose to pursue. Importantly, however, the Constitutional Court did not require that the ACC close down or that its convictions be undone. Rather, it imposed on Indonesia's national parliament a three-year deadline to pass a new statute on the ACC that remedied the constitutional defect.

From 2008, however, an emboldened KPK began targeting more powerful political figures. Public pressure had mounted upon it to do so. Perhaps, however, the KPK did not choose its targets wisely. It pursued serving and retired ministers,

deputy ministers, parliamentarians, ambassadors, more governors and regents, and Bank Indonesia figures. Amongst these was former Bank Indonesia Deputy Governor Aulia Pohan, whose daughter is married to the oldest son of President Susilo Bambang Yudhyono. The KPK also pursued dozens of national parliamentarians for receiving travellers' cheques worth 31 billion rupiah in return for voting in Miranda Sway Goeltom as Bank Indonesia Senior Deputy Governor in 2004.

By pursuing more powerful figures, the KPK drew more intense retribution. The first example of this was the new Anti-Corruption Court Law (ACCL) required by the Constitutional Court decision, mentioned above. Concerns abounded that the national legislature would not meet the Constitutional Court's deadline of 19 December 2009. Some speculated that parliamentarians would stall the bill beyond that date, to force the ACC to disband. It appeared that these concerns might be realised when, several months before the deadline, the chairperson of the bill's drafting team, Law Professor Romli Atmasasmita, was convicted of corruption in the general courts. Before his conviction, he had been a well-regarded anti-corruption reformist. In late 2010, on appeal, the Supreme Court acquitted him, however, drawing speculation that he was targeted to 'get him out of the way' and obstruct the work of the team.

In the event, however, the legislature did enact a new ACCL that addresses the Constitutional Court's main concerns about dualism: it gives the ACCs sole jurisdiction to hear corruption cases. Yet the legislation also seems to have removed the single feature responsible for most of the ACC's success. It gives a career judge – the chairperson of the district court in which the ACC is housed – or the Supreme Court Chief Justice discretion to determine the ratio of ad hoc and career judges to sit on ACC panels. Ad hoc judges can, therefore, now constitute the minority on ACC panels.

This is certainly not the only problematic aspect of the ACC Law, however. The ACCL also requires the establishment of 33 new ACCs – one in the district court of each provincial capital. While expanding the ACC network might, at first glance, appear to be desirable, some commentators consider this a deliberate ploy to dilute the potency of the sole Central Jakarta ACC. In particular, the Supreme Court has had great trouble recruiting enough qualified candidates to fill ad hoc judge positions. This may force general court chairpersons to constitute panels with fewer ad hoc judges than career judges. The days of split-decision convictions could be over.

Also deleterious is that the ACCL does not mention the KPK at all; rather, it refers only to general public prosecutors (*penuntut umum*) bringing actions before the ACC. Ordinary prosecutors can, therefore, now bring cases before the ACCs. Widespread corruption and incompetence amongst Indonesia's prosecutors makes it unlikely that the ACC will be able to maintain anything near its 100 per cent conviction rate. Indeed, in the very first non-KPK prosecution brought before the ACC, the court found fault with the evidence and arguments put by ordinary prosecutors and threw out the case. More significant, however, is that because the KPK is not explicitly mentioned in the ACCL, the KPK's power to prosecute corruption cases in the new ACCs is now tenuous and open to challenge.

That the statute weakens the KPK and ACC is hardly surprising. During deliberation and enactment, the KPK conducted very public raids on the offices of serving members of the national parliament. The KPK had also warned that it had more parliamentarians in its sights. The KPK's timing was not opportune. Anticipating investigation and possible conviction, many DPR members had much to gain from a weakened KPK and ACC.

The KPK's wiretapping powers have been a second target for attack. As mentioned, KPK commissioners can authorise KPK officers to tap suspects' phones. Proposed government regulations, however, seek to require that officers obtain pre-approval from the Communications and Information Ministry, a court, or some other central body; and that suspects be formally charged before tapping commences. These regulations, if adopted, will deprive the KPK of evidence upon which it has heavily relied to obtain many of its convictions: recorded conversations that are frank and incriminating. Being charged would forewarn suspects of potential tapping; and those entrusted with approving the KPK's requests, if themselves corrupt, could forewarn for a fee.

Retaliation has not, however, been limited to institutional attacks. Even individual KPK commissioners have been targeted. In March 2009, then-serving KPK Chairperson, Antasari Azhar, was arrested for ordering the assassination of businessman Nasruddin Zulkarnaen. Police alleged that Antasari had a sexual encounter with Nasruddin's third wife, Rani Juliani. After discovering the encounter, police claimed, Nasruddin began blackmailing Antasari, threatening to publicly reveal it. On 11 February 2010, after a trial brimming with irregularities, more exculpatory than incriminating evidence, and credible allegations that he had been framed, Antasari was convicted and sentenced to 18 years' imprisonment.

In September 2009 police arrested two more serving KPK commissioners, Chandra Muhammad Hamzah and Bibit Samad Rianto, for abusing their powers. Specifically, police charged them with issuing and revoking travel bans to extract bribes from suspects under KPK investigation. From the outset, speculation abounded that the charges were fabricated; police could point to very little evidence. The arrests also exposed two significant flaws in the 2002 KPK Law which establishes the KPK and sets out its institutional design. First, it requires that if commissioners are formally named as suspects, then they must be suspended; and second, that if commissioners are brought to trial, they must be dismissed from office, regardless of whether they are ultimately convicted. Decisions to charge and prosecute are, generally speaking, made unilaterally by police and prosecutors and are unreviewable.

Having been charged, Bibit and Chandra were suspended. Anticipating that they would be dismissed upon commencement of their trials, they challenged, in the Constitutional Court, the legal basis for their pending dismissals before their trials began. They claimed that they had a constitutional right to the presumption of innocence and argued that their suspensions would breach that right. They sought an injunction to prevent their dismissals while awaiting the Constitutional Court's final decision. The court granted this request. This was the only interim

injunction that the court has awarded in a judicial review case since its establishment in 2003.

The Constitutional Court's proceedings were broadcast on live television and streamed online. The court played, in open court, over four hours' of recordings of wiretapped conversations between suspects the KPK was investigating and senior law enforcement officials. The conversations revealed a plot to frame Bibit and Chandra for corruption. Upon hearing the recordings, the Constitutional Court unanimously declared that Bibit and Chandra had been framed, and decided that they should be immediately released from detention and reinstated as KPK commissioners. A fact-finding team that President Susilo Bambang Yudhoyono (SBY) himself established – the so-called 'Team of eight' – drew similar conclusions. Soon thereafter, prosecutors issued an official Declaration of Cessation of Prosecution (SKPP) for both Bibit and Chandra.

The story does not end here, however. In another twist, one of the corruption suspects caught on the recording played in the Constitutional Court, Anggodo Widjojo, lodged with South Jakarta District Court a 'pre-trial' (*pra-peradilan*) application, challenging the legality of Bibit and Chandra's SKPPs. He argued that prosecutors had no grounds for issuing the SKPPs and that sufficient evidence had in fact existed to proceed against Bibit and Chandra. The judge agreed, as did the Jakarta High Court and the Supreme Court on appeal. Their prosecutions reinstated, it seemed, for several months, that Bibit and Chandra might well face trial after all. In response to increased public outrage, however, prosecutors decided to formally drop the case in the public interest using the so-called *deponering* mechanism. The disadvantage of this mechanism, it seems, is that, formally, Bibit and Chandra remain suspects and are perhaps still susceptible to trial.

These events seem to confirm media reports and widespread public speculation that powerful political actors, with something to lose from being investigated and prosecuted by the KPK, have the Commission in their sights. Ironically, those political actors have been able to co-opt institutions that the KPK was itself established to circumvent – the ordinary police, prosecutors and courts. Of course, the recordings played in the Constitutional Court confirmed that police and prosecutor involvement was not limited to assisting political players in their pushback against the KPK. Rather, police and prosecutors have themselves been key players in major corruption scandals. Even without the urgings of these powerful actors, then, many police and prosecutors have a stake in endeavours to discredit and stifle the KPK.

Even police and prosecutors not implicated in these scandals are thought to be willing allies, however. One reason for this willingness is resentment. As mentioned, the KPK, despite being a new institution, has greater powers of investigation than police and prosecutors and can take over their corruption cases. This is said to cause police and prosecutors significant embarrassment. A second reason is that, by taking corruption cases involving large amounts beyond the reach of ordinary police, prosecutors and courts, the KPK has deprived these institutions of a particularly lucrative stream of revenue: bribes from suspects

and defendants in corruption cases, thought to be more 'forthcoming' than suspects and defendants in other types of cases. A third reason is that, as public support for the KPK mounts, inevitably too will pressure to tackle something about which millions of Indonesian citizens commonly complain: justice-sector corruption. The continuing legal impunity of ordinary law enforcers, then, depends on getting the KPK 'out of the way'.

The themes of police corruption and institutional resentment of the KPK are well illustrated by the KPK's investigation into the so-called Bank Century scandal and its aftermath, which consumed Indonesian politics for much of 2009 and 2010. In late 2008 and early 2009, the government made several payments, totalling Rp6.7 trillion (around AU$800 million), to Bank Century. The bank had encountered financial difficulties in the early months of the so-called Global Economic Crisis and the government feared that, if Century fell, more Indonesian banks might follow, cascading into an economic crisis similar to that Indonesia endured from 1997. Yet the majority of this money was illegally diverted to particular depositors who had held large deposits with the bank. The KPK investigated. It tapped the phone of Susno Duadji, the national police's head of criminal investigations. It recorded a conversation in which Susno sought a US$10 million bribe to help tobacco magnate Budi Sampoerna retrieve his large deposits (Sunudyantoro and Kukuh 2009; Jansen 2010). Police Chief Bambang Hendarso Danuri got wind of the wiretap and allegedly warned Susno before he received the bribe (Jansen 2010).

Interviewed in Tempo magazine about his involvement in the scandal and the wiretap, Susno likened KPK investigations of police to a 'cicak' challenging a crocodile (Tempo 2009). 'Cicak' is usually translated as 'gecko' or 'house lizard'. Those who have spent time in Indonesia may remember seeing one on a wall awaiting its prey. Susno was, of course, attempting to convey that a cicak is no match for a crocodile. Anti-corruption campaigners seized upon the imagery Susno had perhaps arrogantly provided, using 'Cicak v. Crocodile' (*cicak melawan buaya*) as a rallying cry in support of the KPK against all who sought to bring down the institution and its commissioners. 'CICAK' became a synonym for '*Cinta Indonesia Cinta KPK*' (love Indonesia, love the KPK) (Husodo 2010).

Significance of this book

It is no exaggeration to say that post-Soeharto political and legal reform sits on a knife's edge. If the only two institutions ever to have made dents in corruption levels are neutered, Indonesia's anti-corruption efforts will surely collapse. In such an environment, continuing efforts to improve government transparency and accountability are likely to fail and progress already achieved might be diluted or reversed. The future of governance reforms, the rule of law and perhaps even the consolidation of Indonesia's so-called democratic transition are all at stake.

Under Soeharto's self-titled New Order (*Orde Baru*) (1966–1998), there were virtually no checks on the exercise of government power. Political power was

tightly centralised within the President's elite. Government was, for the most part, not by law: formally, a constitution bound the state, but no judicial institution had power to hold the government to account for breaching it (Lev 1978). In any event, even if judges had that power, they probably would not have exercised it: the judiciary was not independent of government (Pompe 2005; Lindsey and Dick 2002; Lindsey 2001; Lindsey 2000).

Parliament was, particularly from the mid-1980s, little more than a rubber stamp for government – particularly presidential – policy (Schwarz 1994: 272), with its members either selected through tightly controlled elections or directly appointed by the executive. The government, often with military support and by violent means, strictly confined activities of opposition parties, curtailed and extinguished political freedoms, controlled the media and repressed dissent (Budiman 1994; Lubis 1993). The results were dysfunctional political and legal systems that consistently failed citizens but served government well. These systems provided legal impunity for state actors who sought to pilfer vast amounts from state coffers.

When Suharto was forced to resign in 1998, there was widespread dissatisfaction with the nature of the Indonesian polity (Aspinall and Fealy 2003; Aspinall 2005). During the so-called *Reformasi* period that followed, many pillars of Suharto's authoritarian state were broken down. Political power in Indonesia today is democratically obtained and broadly diffused. Indonesians vote in more free, fair and competitive elections than citizens of most democracies (Ramage 2007: 136). In 2004 and 2009 more than 150 million citizens voted for two legislatures (their local parliament and the national parliament); a national-level regional representative body (the *Dewan Perwakilan Daerah*, or DPD); and the president and vice-president team. Citizens have, from 2005, also directly elected heads of local governments in hundreds of cities and provinces (Davidson 2009: 293).

The central government's monopoly on power has been dispersed by decentralising many of its functions to provincial, district and city parliaments and officials. Almost 500 regional parliaments and executive governments have received broad lawmaking powers and have, generally speaking, exercised those powers with vigour (Butt 2010a).

The judiciary, once administered and tightly controlled by government departments, is now institutionally independent of government (Butt and Lindsey 2010a). Indonesia's constitution now boasts a world-standard Bill of Rights and the Constitutional Court ensures that the national legislature upholds those rights (Butt 2007a). The military has lost its representation in the national parliament and has retreated from the foreground of Indonesian politics (Mietzner 2009a).

Continuing corruption is perhaps the greatest threat to the consolidation and continuation of this progress. Recent scholarly work has questioned the 'quality' (Merkel and Croissant 2004) of Indonesian democracy given the prevalence of corruption in politics (Case 2009: 256–7; Mietzner 2009b; Hadiz 2008). Some even question whether, in the face of so-called money politics, democracy has, in fact, been consolidated.[2] Indonesia's parliaments and executive offices might

be filled with elected representatives; but if corruption remains unchecked, then illicit payments, rather than public interest, are likely to dictate state policy and decision-making. If politicians respond primarily to bribes rather than the needs of their citizens, they are hardly true representatives of their constituents.

Similarly, widespread corruption in local government thwarts a primary purpose of decentralisation – bringing government closer to the people to enhance responsiveness and accountability. Some commentators have argued that decentralisation in some parts of Indonesia has done little more than bring corrupt government and government corruption closer to the people. Likewise, an institutionally independent judiciary is of little benefit if litigants can 'purchase' favourable decisions.

The survival of an effective KPK and ACC is, therefore, critical to real and sustainable political, economic and legal reform in Indonesia. Will political forces with much to gain from the old corrupt system hobble the KPK and maintain the status quo, perhaps leading to regression into Soeharto-era practices? Or can the KPK, backed by reformist groups and with massive public support, deflect these attacks and continue its work, perhaps ultimately leading Indonesia to 'real' democracy with clean and functional government officials and institutions?

Purpose of this book

The medium for much resistance to anti-corruption reform has been the law, whether judicial process (through the courts, general and constitutional) or the passage of new laws or amendments. It is largely in Indonesia's courtrooms and law making institutions that key battles between reformists and those preferring the status quo have played out. The main objective of this book is to describe and analyse those judicial processes and legal changes. More broadly, I aim to demonstrate that, despite persistent claims by commentators that Indonesia's legal system is dysfunctional, law is far from irrelevant in modern-day Indonesia. I seek to emphasise the continuing importance of law and legal process to the future success of Indonesian governance reforms.

An outline of chapters

In Chapter 1, I describe Indonesia's corruption problem, show that corruption reached high levels under Soeharto, and discuss claims that corruption has in fact increased since his fall in 1998. Presuming that corruption will continue unless people are caught and imprisoned for engaging in it, I consider Indonesia's legal framework for corruption reduction. I argue that the 1999 ACL is strong and that the main problems lie with its enforcement. In particular, I highlight the failings of ordinary law enforcement agencies – the police, prosecution and courts – and the shortcomings of various anti-corruption institutions and programmes that pre-dated the KPK. I then describe the institutional design of the KPK and the ACC from 2003–2009 and show that they share none of these

shortcomings. I focus on the KPK's authority to initiate and to take over corruption cases, and other powers aimed at making KPK investigations and prosecutions easier and convictions more likely in the ACC. These institutional features, I argue, have made the KPK and ACC largely effective and successful. And it is these very features that have been attacked and challenged.

Chapter 2 traces the trajectory of the KPK's performance, from its early successes in relatively minor corruption cases, to its consolidation up to 2007, and its emboldening from 2008. By analysing case statistics, I show that the KPK and ACC have clearly outperformed ordinary police, prosecutors and courts. I also briefly describe some of the most significant cases the KPK and ACC have handled. I underline, however, that they have only scratched the surface of Indonesia's corruption problem. The KPK and ACC handle only a very small proportion of corruption cases; most are still handled by ordinary law enforcement institutions.

In Chapter 3, I discuss the pushback against the KPK and ACC between 2003 and 2007. This began with senior politicians, including President SBY himself, displaying public ambiguity about both institutions. More serious, however, were the challenges to the constitutionality of the 2002 KPK Law and 1999 Anti-Corruption Law, some of which the Constitutional Court upheld. The focus of this chapter is my analysis of three of these Constitutional Court decisions. I show, however, that with one exception, these decisions did not discourage the KPK and ACC, nor hamper their performance. They were able to work around the decisions to continue their work and build further momentum and public support. The Constitutional Court's decision in the *ACC* case, however, had lasting consequences, which are described in the Conclusion of this book.

Chapters 4 and 5 highlight the intensifying resistance that the KPK faced when, from 2008, it began targeting senior politicians and officials – among them former and serving ministers and parliamentarians. In Chapter 4, I analyse the trial of then KPK Chairperson, Antasari Azhar, who was ultimately convicted of murder. Absent admissions or revelations similar to those that emerged in Bibit and Chandra's case, it is impossible to conclude with certainty that he, too, was framed. However, the case against him was feeble in the extreme. I aim to show that the evidence against Antasari was so weak that he should have been acquitted.

In Chapter 5, I cover the legal aspects of the Bibit and Chandra saga, including their arrest, detention and suspension. My focus, however, is upon their Constitutional Court proceedings, for this is where their framing was exposed. The court also decided that their pending dismissal breached the presumption of innocence. I show, however, that the court's legal reasoning was, on the whole, highly questionable, leaving the impression that the court treated Bibit and Chandra's as a special case. I also canvass the possibility that Bibit and Chandra may still be tried, despite the Constitutional Court's declaration that they had been framed and public prosecutors officially dropping their case in the public interest.

The Conclusion of this book examines Indonesia's new ACCL, enacted in 2009 in response to the Constitutional Court decision, mentioned above. I argue

that this statute significantly weakens the KPK and ACC. I also analyse proposed regulations intended to curb the KPK's investigation powers, including tapping and tracing suspects' phones; and proposed amendments to the 2002 KPK Law and the 1999 Anti-Corrupton Law. Taken together, I show, these law 'reforms' have taken away, or threaten to take away, many of the institutional features the KPK and ACC have relied upon for their past successes. Though the Constitutional Court remains a staunch ally of the KPK, unless these moves to weaken the KPK cease and are reversed, future Indonesian governance reform is likely to fail.

1 Corruption, the KPK and the ACC

By any standards, Indonesia's corruption levels are high.[1] Corruption has been prevalent in government throughout most of Indonesia's modern history – including under Soekarno's 'Old Order' (*Orde Lama*) (1947–1966) and even during Dutch colonialism. By most accounts, however, corruption increased significantly and became deeply entrenched in government institutions during Soeharto's reign (Robertson-Snape 1999: 592). There are indications, albeit anecdotal, that, since Soeharto's fall, overall corruption has in fact increased. Regional autonomy is commonly blamed for this because it disperses power to regional officials, many of whom are thought to exploit their office for private gain (Pratikno 2005; Hadiz 2004; Hadiz and Robison 2005).

In this book, I do not seek to engage in the well-documented debate about whether corruption is a 'bad thing'. Corruption is usually economically and developmentally deleterious, repels foreign investment, reduces tax revenue, diverts public service funding, and perpetuates social and economic poverty and disparity.[2] The following statement from the World Bank, which refers to Indonesia, reflects the current orthodoxy:

> Corruption weakens the ability of the state to deliver basic public goods: essential services and the rules that allow societies to function effectively. As such it taxes most the poor and [Indonesia's vulnerable] silent majority, creates high macro-economic risks, jeopardizes financial stability, compromises public safety and law and order, and above all, it undermines the legitimacy and credibility of the state in the eyes of the people. Corruption, therefore, represents a significant threat to a successful political and economic transition for Indonesia. By undermining the formal rules and the key organizations which are charged with safeguarding them, and by destroying people's faith in these institutions, democracy itself is threatened.
>
> (World Bank 2004a: ii)

The General Elucidation to the 2002 KPK Law takes a similar line:

> Unimpeded increases in corruption create disaster, not only to the national economy, but also to general national and state life. Extensive and systematic

> corruption also constitutes a breach of the social and economic rights of the community and, therefore, corruption can no longer be classified as an ordinary crime, but rather as an extraordinary crime.

Given the harm it is said to cause, why are Indonesia's corruption levels so high? This enquiry requires significant sociological research and is beyond the scope of this study. For the same reason, I will not assess claims that corruption is somehow intrinsically Indonesian (except to say that such claims are dubious given the multitude of Indonesian cultures and the strong public condemnation of corruption amongst state institutions and leaders). I limit myself to the following observations about the spread of corruption during the Soeharto era.

Under Soeharto, corruption did not simply grow out of low government budgets and official salaries, and the failure of government to stamp it out. Corruption was part of a 'conscious effort to generate and harvest rents from business (and, to a lesser extent, from individuals) at all levels' (McLeod 2000: 102). In his seminal piece on Soeharto-era corruption, McLeod (2000: 101–2) describes the system that developed as akin to a franchise:

> Just as Soeharto used his position as head of the national government to bestow privileges on selected firms ('cronies', as they have come to be known), so he effectively awarded franchises to other government officials at lower levels to act in similar manner. This included many of his ministers and senior bureaucrats, government administrators at all levels – from provinces down to rural villages – and top executives in the state enterprises and special government bodies.… These franchises were not awarded free of charge, of course: as with orthodox business franchises, there had to be benefits to both franchiser and franchisee. The payback could be in a multitude of forms: payment to a Soeharto controlled *yayasan* [so-called charitable foundation]; the provision of loans and award of contracts on favourable terms to first family members and business cronies by state banks, state enterprises, and government departments; a flow of information to the top regarding individuals or organisations that might threaten the existence of the system; a willingness to act against such individuals and organisations in order to protect it; and of course clear loyalty to the head of the franchise whenever there might be a public outcry about the way the country was being governed.

This system made Soeharto and his inner circle very rich. He and his children amassed something between US$15 billion and 35 billion during his 32-year rule, despite his presidential salary being only $US1,764 per month (Colmey and Liebhold 1999). This earned him top place on Transparency International's 2004 list of most corrupt leaders, well ahead of former Philippine president Ferdinand Marcos (estimated US$5–10 billion) and Zaire's Mobutu Sese Seko (estimated US$5 billion) (*BBC* 2004; *Jakarta Post* 2010c). Even international donors were forced to work within the system. During Soeharto's rule, around

30 per cent of World Bank loans were skimmed due to corruption (Vickers 2005: 187). Unfortunately, the system left most government institutions severely dysfunctional – their primary purposes became extracting illegal rents rather than performing the tasks for which they were purportedly established (Schwarz 2000; Palmier 1985).

Yet, while Soeharto was in power, corruption was largely tolerated by many Indonesians and donors alike because Indonesia's economic growth and development was so outstanding. From soon after Soeharto took over from Soekarno in the late 1960s until 1996, the economy grew at an average annual rate of around seven per cent. Poverty was reduced significantly and living and educational standards improved markedly (Kian Wie 2008). Progress was so good that the World Bank proclaimed, in 1994, Indonesia to be one of the eight 'High Performing Asian Economies', alongside Japan, South Korea, Taiwan, Hong Kong and Singapore (World Bank 1994).

During the 1997 Asian Economic Crisis and its aftermath, however, public resentment towards the beneficiaries of Soeharto's corruption networks grew exponentially as Indonesia's economy collapsed. If, in the eyes of some, corruption had been an acceptable by-product of the Soeharto regime's economic gains, or was in fact economically efficient in some circumstances,[3] tolerance was replaced by overwhelming distain. Key donors such as the International Monetary Fund and the World Bank attributed the economic crisis, at least in part, to the high levels of corruption in government and made financial bailouts contingent upon anti-corruption reform. As mentioned in the Introduction, corruption eradication was one of the rallying cries of the so-called *Reformasi* movement that propelled Indonesia to democracy and decentralisation.

In this book, I presume that the most effective way to reduce corruption is to make it more likely that people are caught and imprisoned for engaging in it, and are then forced to disgorge the proceeds.[4] Increased budgets and salaries might reduce the 'need' to engage in corruption, but officials are rational individuals; they are likely to seek and receive illicit payments if opportunities exist and detection and punishment are improbable (Klitgaard 1988: 75). Successful detection and punishment, of course, require effective corruption laws and the enforcement of those laws (Rose-Ackerman 1997a: 19–20).

To this end, in this chapter I describe key aspects of Indonesia's anti-corruption laws and the institutions charged with enforcing them, including the KPK and ACC, and assess their adequacy for reducing corruption. I argue that the legal infrastructure for handling corruption cases is strong. The 1999 Anti-Corruption Law defines corruption very broadly indeed, thereby catching a wide range of behaviour. The Law also makes investigating and prosecuting corruption easier than other crimes, and provides severe penalties, including the death penalty. The Law is, therefore, not inherently defective or inadequate.

The main weakness has been the institutions charged with enforcing the Law. There have been several anti-corruption institutions and initiatives, but, with the exception of the KPK and ACC, most have been markedly unsuccessful in reducing corruption. This is because the institutional design of these institutions were

flawed – perhaps deliberately. In particular, they were under-resourced and many were established to coordinate the handling of corruption cases by existing institutions – namely the ordinary police, public prosecution and courts – themselves widely considered to be highly corrupt.

In this chapter I also describe the 2002 KPK Law. It breaks new ground in combating corruption in Indonesia, primarily because it removes the powers of ordinary law enforcement institutions to pursue some types of corruption cases. These powers are instead granted to two institutions the Law establishes – the KPK and ACC – whose respective institutional designs are also discussed in this chapter. The institutional design of the KPK and ACC makes them immeasurably more effective than their predecessors and counterparts in ordinary law enforcement when investigating, prosecuting and adjudicating corruption cases.

The remarkable success of the KPK and ACC, described in Chapter 2, is often attributed to these institutional features. It is, therefore, unsurprising that several of those who have been, or expect to be, investigated by the KPK have challenged the legality of some of these features in Indonesia's Constitutional Court and other legal and public fora, as discussed in Chapter 3.

The 1999 Corruption Laws

Indonesia's Anti-Corruption Law of 1999,[5] as amended in 2001,[6] defines various types of corruption and sets out penalties for those found guilty of them.[7] For the purposes of this book, Article 2(1) is perhaps its most important provision. Article 2(1) includes a broad definition of corruption that aims to catch anyone who 'illegally enriches him or herself or another person in a way which could damage the state finances or economy'. The official Elucidation[8] to Article 2(1) makes 'illegal' some types of acts that do not breach written law. Prosecutors need only show is that the act conflicts with 'justice or the social values existing in the community' and that it benefited the perpetrator or another. In addition, whether state finances or the economy were actually damaged is irrelevant; all that is required that the act *could* have done so.[9] Importantly, the Law specifies that returning the money does not undo the damage to the state finances and therefore, of itself, take the alleged act out of the definition (Article 4).

Penalties for contravening Article 2(1) include imprisonment for life, or for between four and 20 years, and a fine of between 200 million and one billion rupiah. Article 2(2) provides the 1999 Law with even more potency: it allows judges to impose the death penalty in 'certain circumstances'. The Elucidation to Article 2(2) defines these to be circumstances in which corruption affects funds allocated for recovery after a state of emergency, national natural disaster, widespread social unrest, or economic or monetary crises; and for repeated crimes of corruption. Some of the complex legal issues raised by Article 2(1) are discussed in detail in Chapter 3.

Other important provisions include the following.

- Article 3 states that any person who, with the aim of enriching him or herself, another person or a corporation, misuses his or her authority, opportunities, or means at his or her disposal which arise because of the office he or she holds, and by doing so could damage the state's finances or economy, faces life imprisonment, between one and 20 years' imprisonment, and/or a fine between 50 million and one billion rupiah.
- Article 5 prohibits giving or promising something to a public servant or state official so that they do or refrain from doing something in their official capacity or breach the obligations of their office. Contravening Article 5 attracts a prison sentence of between one and five years.
- Article 6(1)(a) prohibits bribing a judge to influence a decision and imposes a penalty of between three and 15 years for doing so.
- Article 12 imposes penalties upon public servants, state officials and judges who receive gifts or accept promises to do or refrain from doing something in the course of their official duties. These include life imprisonment, or between four and 20 years' jail.
- Article 8 imposes sentences of between three and five years upon public servants and others who embezzle funds.
- Article 15 deals with those who help commit crimes punishable under the Law. They face the same punishments as those who actually commit the crime. This differs from the general position under Indonesian law, whereby punishments are reduced by one-third for those who were involved in the crime but did not physically commit it.

As mentioned, the 1999 Law also gives police and prosecutors powers designed to improve the efficacy and expediency of corruption investigations, prosecutions and trials. For example, if after being legally summonsed the defendant does not attend court, he or she can be tried *in absentia* (Article 38(1)). Investigators, prosecutors and judges can request banks to freeze accounts where corrupt money is thought to be held (Article 29(4)). (While this might be quite a frequently sought interlocutory remedy in other countries, particularly in common law jurisdictions, it was virtually unknown within the Indonesian legal system before the introduction of this statute.) Investigators can also intercept communications suspected to relate to corruption (Article 30).

The 1999 Anti-Corruption Law also provides exceptions to Indonesian evidential rules, discussed in Chapter 4, that were often blamed for making corruption cases difficult to prosecute successfully. In particular, unlike the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, or KUHAP) under which evidence that is not documentary or in-court testimony is usually given little or no weight, the Anti-Corruption Law specifically allows the use of 'new' types of evidence, such as electronic information, recordings and photographs and other media, to be used in corruption cases (Article 26A).

Finally, the 1999 Anti-Corruption Law provides for what it refers to as the 'Reverse Burden of Proof' (*pembuktian terbalik*). This is misleading terminol-

ogy, however. The Law does not in fact reverse the burden of proof, from the prosecution to prove guilt, to the defendant to prove innocence. Rather, it declares that if the defendant cannot explain the source of identified assets, judges can use this failure to strengthen suspicions that the defendant is guilty of corruption. The Law also allows judges to order the defendant, if found guilty, to repay the money obtained through corruption and to order prosecutors to auction the defendant's assets to repay the money (Article 18).

Pre-KPK anti-corruption institutions and initiatives

Indonesia has certainly had no shortage of anti-corruption commissions, organisations, institutions and initiatives, both governmental and non-governmental. Even Soeharto, under whom corruption flourished, established several teams and commissions whose stated aims were to assist with corruption eradication. They were destined to fail, however, for two main reasons. First, their primary purpose appeared to be shoring up his regime's legitimacy. Following an allegedly communist-inspired coup attempt (30 September–1 October, 1965), General Soeharto had emerged as the leading senior officer in its suppression. He needed to establish the legitimacy of his regime as, without elections, he gradually usurped power from President Soekarno (Ramage 1993: 76). One of the ways in which he attempted to do so was by dramatising corruption under Soekarno's Old Order by making sensational revelations about the improprieties of former government ministers and leaders. This gave rise to demands for correction and reform (Lev 1978: 272). Soeharto promised to deliver them. Second, with Soeharto's far-reaching corruption franchise in full swing, it is difficult to see how his piecemeal anti-corruption efforts could ever significantly reduce corruption levels, if, indeed, they were ever intended to do so.

New Order initiatives

Just six months after being formally installed as president in 1967, Soeharto established a Corruption Eradication Team (*Tim Pemberantasan Korupsi*) headed by the Attorney-General, with members including the Chief of Police, the Minister of Justice and the Army Commander-in-Chief. Its main function was to assist the government to eradicate corruption by coordinating military and civilian investigators in corruption cases (Hamzah 1984: 52). Yet it did not target those primarily responsible for the majority of high-level corruption in Indonesia at that time: military and political figures (Yuntho 2005: 3). Rather, it yielded only several very low-level convictions.

An Anti-Corruption Commission (*Komisi Anti Korupsi*) – a forum for political party leaders to meet with the President to discuss corruption – was established in 1970 but was abolished two months later. Suharto created, also in 1970, the Commission of Four (*Komisi Empat*), headed by former Vice President Mohammad Hatta, which was to recommend policies to the government to improve corruption eradication (Hamzah 1984: 53). It also exposed tax evasion

in the state-owned oil company, Pertamina, and revealed financial impropriety in the State Logistics Body (Assegaf 2002: 134).

The government did not, however, respond to *Komisi Empat*'s findings and it was dissolved six months after its establishment (Assegaf 2002: 134). Only one high-level official was imprisoned for corruption between 1970 and 1977: Deputy Police Chief Lieutenant General Siswadji. He was sentenced to eight years' imprisonment for embezzling 16.4 billion rupiah in state funds (1977). In 1977, Budiadji, a mid-level provincial depot head of the State Logistics Body, was convicted for embezzling around US$18 million at the then-prevailing exchange rate (Akhmadi 2010: xiii–xiv). He was sentenced to life imprisonment but, with presidential clemency, his term was reduced to 20 years (Yuntho 2005: 3). In 1982, a Presidential Decree was drafted to reinstate the *Tim Pemberantasan Korupsi*, but Soeharto never signed it.

Finally, 'Operation Order' (*Operasi Ketertiban*) was initiated under Presidential Instruction No 9 of 1977. Anti-government dissent, rather than corruption, was its initial focus, however (Assegaf 2002: 134). It then targeted extortion on the streets and focused on illegal payments to government officials. From July 1977 through to March 1981, it handled 1,127 cases involving 8,026 people and around 200 billion rupiah was returned to the state (Yuntho 2005: 4; Masyarakat Transparansi Indonesia 2000a; Masyarakat Transparansi Indonesia 2000b). However, most cases involved only petty corruption (Jasin 2010: 18).

Post-Soeharto initiatives

As mentioned in the Introduction to this book, many features of Soeharto's New Order regime had become deeply unpopular well before he was forced to step down in May 1998. With the collapse of the economy, the legitimacy of the overly-centralised and repressive state eroded, as did executive and military domination of politics. Pressure for reform – including corruption eradication, decentralisation, democracy, judicial independence, and human rights – had been steadily building for decades, but had, to this point, been repressed. The fall of Soeharto released this pressure, and with it came the giddy optimism of *reformasi* – a movement led by reformist leaders and civil society that enjoyed very high levels of public support. Beyond the expectations of many, Bacharuddin Jusuf Habibie, Soeharto's successor and former Vice President, embarked on many of these reforms (Hosen 2010). Most of them did not reach fruition before he was voted out of office, but many of them endure, albeit imperfectly, more than a decade later. Statutes were passed requiring the establishment of the KPK and its precursors, including the so-called 'Joint Team' and the State Officials Asset Auditing Commission. I now turn to discuss these institutions, and the Ombudsman, whose mandate also includes corruption eradication.

State Officials Asset Auditing Commission (KPKPN)

Law No 28 of 1999 on Clean and Corruption, Collusion and Nepotism-free Governance (*Penyelenggaraan Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme*) required all state officials to report their assets, and the assets of their spouses and children, before, during and after holding office (Article 5). The State Officials Asset Auditing Commission (*Komisi Pemeriksa Kekayaan Penyelenggara Negara*, or KPKPN) was established in January 2001 to record and audit those assets.[10]

The primary function of the KPKPN was to detect possible corruption by identifying discrepancies between an official's income and his or her assets.[11] As mentioned, documentary evidence of such discrepancies could then be taken to strengthen suspicions of guilt if the defendant was unable to explain them. The requirement of disclosure and the likelihood of detection would, it was hoped, have sufficient deterrent effect to prevent corruption.

Initially, however, there seemed little hope that the KPKPN would be effective, for several reasons. First, the commission had limited powers. If it detected possible corruption, it could neither conduct further investigations nor prosecute. The commission could not even check officials' bank accounts without the suspect's explicit permission (Sherlock 2002: 375). The commission could merely hand over its findings to police or prosecutors and hope that they pursued them. Police and prosecutor follow-up was no certainty, however, as is clear from their poor track record in corruption cases, discussed below. Second, the commission was hobbled by low staffing and budgets. Finally, although officials who failed to disclose their assets were, by law, subject to administrative penalty,[12] there was confusion over what that penalty was and whether the commission or the institution in which the official worked was to impose it. Many officials, therefore, simply ignored the commission's requests or submitted inaccurate disclosure documentation (Aspandi 2002: 198–9).

Nevertheless, soon after the commission began operating, the President and Vice President declared their assets and urged other officials to do the same, thereby giving the KPKPN greater traction. The KPKPN vigorously lobbied high-level officials to ensure that their staff lodged reports, and used the media to name and shame noncompliance and to reward compliance (World Bank 2004a: 13). These efforts bore fruit. By June 2003, 59 per cent of the executive, 87 per cent of the legislature and 84 per cent of the judiciary had declared their assets (World Bank 2004a: 13). The KPKPN had also uncovered questionable assets held by several judges, and exposed the Attorney-General for failing to disclose a 2.4 billion rupiah luxury house that he passed on to his daughter as a gift (Waluyo and Himawan 2002).

The KPKPN was only intended to operate until the establishment of the KPK, however. When the KPK was established in 2003, the commission was subsumed within the KPK.

The Joint Investigating Team (TGPTK)

The Joint Investigating Team for the Eradication of Corruption (*Tim Gabungan Pemberantasan Tindakan Korupsi*, or TGPTK) was established in 2000 with the encouragement of the International Monetary Fund.[13] Like the KPKPN, it was intended to operate only until the KPK came into being (Buente and Ufen 2008: 8). Also like the KPKPN, its powers were limited. The team's purpose was to help with difficult-to-prove corruption cases, but only by coordinating investigations and prosecutions that ordinary police and prosecutors conducted. It could not investigate or prosecute on its own initiative. The team worked under the direction of the Attorney-General, who decided which cases it would pursue and selected its members primarily from the ranks of police and prosecutors.

The Joint Team appeared doomed to fail, for several reasons. As Assegaf (2002: 135–6) explains, it was drastically underfunded – indeed, during its first few months the government gave it no funding or facilities. Its members remained active in their everyday jobs, leaving them with insufficient time to devote to the team's work. Most critical, however, was that the team was forced to work with existing police, prosecutors and courts, the pitfalls of which are discussed below.

Nevertheless, the Joint Team had several things in its favour. It was headed by well-respected former Supreme Court judge Adi Andojo Soetjipto. Further, it was less likely to drop or delay investigations and prosecutions than ordinary law enforcers. The team could not cease prosecutions at will – permission from the Attorney-General was required.[14] And investigations and prosecutions coordinated by the team were subject to time limits: cases were to be brought before a court within 220 days of investigations commencing.[15] Ultimately, however, the Joint Team was able to complete investigations leading to prosecutions in only around ten per cent of the cases submitted to it (Assegaf 2002: 135), leading Soetjipto to eventually resign in frustration (*Jakarta Post* 2001).

Though the team was only ever intended to be a temporary body, its time was cut short after it attempted to investigate Supreme Court judges implicated in a bribery scandal. A man named Endin Wahyudin admitted in 2000 to bribing three Supreme Court judges for a favourable judgment in his client's inheritance dispute.[16] Although he obtained the decision he sought, the local district court responsible for enforcing it failed to do so.[17] He claimed to have then sought assistance from the three Supreme Court judges he had bribed, but was ignored. In desperation, he approached Attorney-General Marzuki Darusman and Soetjipto who promised him immunity from prosecution if he formally reported the judges. The Joint Team began preparing the case against the judges. However, before this case could be heard, the judges reported Endin to the police, alleging defamation. Endin was quickly tried, convicted and sentenced to three months' jail, suspended for six months.

In the meantime, the TGPTK-led prosecution of the three judges was thrown out of court in highly questionable pre-trial (*pra-peradilan*) proceedings. Article 77 of the Code of Criminal Procedure allows suspects and potential

defendants to challenge, in pre-trial proceedings, on narrowly defined grounds, the legality of arrests, detentions or seizures (Fitzpatrick 2008: 505–6). (Interested parties can also employ *pra-peradilan* proceedings to object to the cessation of an investigation or prosecution – an avenue discussed in more detail in Chapter 5.)

The court probably lacked jurisdiction to adjudicate the application. The judges' claim – that the Joint Team lacked the authority to investigate them – falls well outside the Article 77 grounds under which pre-trial proceedings can be brought. Nevertheless, the Jakarta District Court heard the application and also upheld the judges' claims, despite the arguments presented for dismissing the case against them being feeble in the extreme. They included that the Joint Team lacked jurisdiction to investigate them because the statute establishing the Joint Team was not in force at the time the alleged bribes were received. As Assegaf (2002: 138) points out, this was irrelevant because the Joint Team was, in essence, little more than a coordinating taskforce within the Attorney-General's Office, made up largely of pre-existing prosecutors and police. It was thus not a new body with powers exceeding those of traditional police and prosecutors – it *was* traditional police and prosecutors. Yet the court accepted the argument.

Not content with having their prosecution halted, the judges then filed a judicial review request with the Supreme Court. They sought a declaration that the government regulation that established the Joint Team[18] was inconsistent with the statute that had authorised the team's establishment – the 1999 Corruption Law – and was, therefore, invalid. Again, the judges' arguments were nonsensical. In particular, they claimed that Article 27 of the statute only stated that the team 'could be established' (*dapat dibentuk*) 'in the event that corruption is discovered that is difficult to prove' pending the KPK's creation. This, they argued, made it clear that the team was temporary. However, they argued, several provisions of the Regulation, particularly Articles 6(2) and 18, indicated that the team was permanent (*bersifat tetap*). It was open to the court to simply affirm that the Joint Team was indeed only intended to operate until the KPK's establishment and allow the team to continue its work. But the court decided that this perceived inconsistency was so significant as to require the entire regulation to be invalidated. Lacking a legal basis, the Joint Team ceased operating.

The Ombudsman

Brief mention should also be made of the Ombudsman. Its mandate includes helping eradicate corruption.[19] However, the Ombudsman appears to have been unable to do so. Indeed, despite extensive searching, I was unable to identify any Ombudsman investigation into alleged corruption that led to criminal proceedings, let alone a conviction.

The Ombudsman was established by Presidential Decree No 44 of 2000. In its first year, it received 1,723 complaints, mostly about maladministration and corruption in the courts and police force (Crouch 2008: 386). Within a few years, however, the number of complaints lodged had dropped to the extent that the

Ombudsman had 'almost completely fallen out of public attention' (Crouch 2008: 387).

This is at least partly attributable to the Ombudsman's lack of political support and budget (World Bank 2004a: 13). More significant, however, is the Ombudsman's lack of coercive powers. The main weapon in the Ombudsman's arsenal is 'naming and shaming', that is, publicising through the media complaints made to it about government services and its recommendations. It cannot compel government officials and departments to respond to its inquiries and recommendations; many have simply ignored the Ombudsman's requests and investigations (Sherlock 2002: 369–70; *Hukumonline* 2010u).

A rise in complaints to the Ombudsman in recent years seems to indicate new or renewed faith in the institution.[20] Yet new legislation related to the Ombudsman in 2008, while perhaps implicitly bolstering its political support, did not provide it with coercive powers.[21] The Ombudsman, therefore, remains toothless, unless the complained-of official or government department can be embarrassed into action. This leaves the Ombudsman inadequately equipped to function as an anti-corruption institution. As Chapter 5 shows, many high-level police and prosecutors refuse to admit wrongdoing, even in the face of overwhelming and publicly exposed evidence of their impropriety. As mentioned, nothing short of conviction, punishment and asset return is likely to deter corruption or reduce corruption levels.

Common denominator of failure: ordinary police, prosecutors, courts

The anti-corruption initiatives discussed above – including the KPKN, TGPTK and Ombudsman – shared important features. They could coordinate, advise and offer assistance, but could take no 'real' action themselves. Ultimately, responsibility fell to ordinary police and prosecutors to decide whether to pursue the case and to the ordinary courts to adjudicate it. Leaving corruption cases to these three law enforcement institutions has been perhaps the most significant single impediment to effective enforcement of Indonesia's corruption laws. All three are widely considered to be largely incompetent, underfunded and corrupt.

Corruption within the ranks of these institutions is undoubtedly very high and has been well documented, though it is impossible to accurately quantify. Determining corruption levels within institutions is, of course, a difficult task, not least because detecting corruption is highly problematic. Perpetrators often take great care to cover their tracks. In the absence of an admission, direct evidence is often elusive. Even one of the most widely respected international anti-corruption organisations – Transparency International – when ranking corruption relies heavily on mere perceptions of corruption. It is important, therefore, to emphasise that claims about the extent of corruption within these law enforcement agencies are based largely on public perceptions, anecdotal accounts, commonly revealed in the media and discussions with lawyers and law reform activists, rather than on firm empirical data (Butt and Lindsey 2010b). No doubt some cases proceed

without corruption taking place at all. With little to indicate the contrary, however, it seems appropriate to assume that the following claims about corruption within these institutions are largely accurate (Butt and Lindsey 2010b).

Police, prosecutors and judges are often criticised for seeking illicit payments from suspects and defendants and their families, sometimes using their lawyers as 'go-betweens'. Bribes are said to be commonly extorted or paid to police to avoid or delay arrest, investigation and detention; and to alter, remove or supplement statements or evidence in the case file of the suspect or defendant (ICW 2001: 1–3; World Bank 2004a: 83; World Bank 2004b: 72). Extortion is so commonplace that, according to the World Bank:

> The man on the street – especially in Indonesia's big cities, does not see the police as being there to serve and protect, but to tax and harass the public. Being flagged down by a traffic policeman is an everyday experience for most Indonesians, and one that inevitably leads to a bribe. Most people know how much is expected of them and quietly pay.
>
> (World Bank 2004a: 84)

> A common refrain from villagers [is] that reporting a stolen chicken to the police [requires] a goat's worth of bribes; reporting a goat [requires] a cow's worth of bribes.
>
> (World Bank 2004b: 59)

Of particular concern has been the work of prosecutors, not only when presenting their cases in court, but also through their issuance of pre-trial Cessation of Investigation Orders (*Surat Perintah Perhentian Penyidikan*, or SP3) (Aspandi 2002: 33; Fenwick 2008: 406; Yunto 2008).

Many SP3s have been issued on vague and otherwise suspect grounds in cases involving vast sums and 'big fish' (*kakap besar*) – such as those involving former President Soeharto and members of his family. In these cases it was generally suspected that there was, in fact, sufficient evidence to proceed to trial, but the case was dropped as a result of intense political pressure, an illegal payment, or both. The power to issue SP3s is discussed in more detail in the context of the Bibit and Chandra case in Chapter 5.

Some prosecutors allegedly seek payment in return for indicting a suspect under a lesser charge or seeking a lesser sentence before the court (Assegaf 2002: 130). To extract an illicit payment, prosecutors may even claim that the suspect's alleged act fits the definition of a more serious crime than was actually committed (Aspandi 2002: 161; World Bank 2004b: 75). As for judges, litigants and lawyers complain about them selling favourable decisions – even about the 'justice' process resembling an auction, where the party offering the highest bribe wins (Pemberton 1999). According to Lev (1999: 186):

> [u]nder-the-table money – so common that it is often above table – has become a standard procedural stratagem … in both civil and criminal cases…

That corruption is so prevalent within law enforcement institutions is hardly surprising. These institutions were integral components of Soeharto's 'franchise' (McLeod 2000), mentioned above, and many remnants of his network remain. Even the recruitment process for police, prosecutors and judges is said to be tainted. Many pay large sums to be employed, but few complain because they recoup their investment soon after they commence work and begin receiving bribes (Goodpaster 2002: 97).[22] Patronage networks are said to exist between lower-level and senior law enforcers, whereby subordinates provide a proportion of their illicit payments to their superiors. In return, their superiors will usually protect their subordinates if allegations of impropriety are levelled. It is well-known too that police, prosecutors and judges do not use the funds solely to line their own pockets. A significant portion of this money is used to supplement very low government-provided budgets for salaries and operational expenses – said to be around 30–40 per cent of required expenditure (World Bank 2004a: 85).

Clearly, a 'justice' system that is, on the whole, this corrupt cannot be relied upon to professionally handle any type of case, let alone a corruption case. By paying off officials, perpetrators can avoid being effectively investigated, prosecuted or convicted for corruption. Indeed, they can feel confident that their 'misdeed[s] will never be punished' (Dakolias and Thachuk 2000: 358). Rose-Ackerman (1997b: 106) argues that a functioning legal framework, including law enforcement institutions, is a 'basic condition for corruption control'. In particular,

> A corrupt or politically dependent judiciary can facilitate high-level corruption, undermine reforms, and override legal norms. When the judiciary is part of the corrupt system, the wealthy and the corrupt operate with impunity, confident that a well-placed payoff will deal with any legal problems.
>
> (Rose-Ackerman 1999: 151)

In the Indonesian context, Assegaf and Goodpaster have made similar observations:

> It is obviously impossible to eliminate corruption if the very law enforcement agencies with responsibility for handling corruption cases have become centres of corruption.
>
> (Assegaf 2002: 130)

> Corruption in the legal system eviscerates Indonesia's reform efforts because the system by and large cannot be trusted to render honest decisions, but may be trusted to protect corrupt activities.
>
> (Goodpaster 2002: 97)

The performance in corruption cases of ordinary police, prosecutors and courts is discussed further in Chapter 2.

With a large percentage of law enforcers engaging in such practices and, therefore benefiting from the status quo, their resistance to reform has been predictably strong and generally successful. An example of this resistance, mentioned above, was the Supreme Court's response to the Joint Team investigation into some of its judges. The establishment of the KPK and ACC, discussed below, constituted implicit recognition, therefore, not only that the ordinary police, prosecutors and courts were, on the whole, too corrupt to handle corruption cases themselves, but also that their reform was unlikely to succeed, at least in the short-to-medium term.

Introducing the KPK and ACC

Many viewed the KPK's prospects with healthy scepticism born out of Indonesia's past failures, mentioned above. If the much-touted KPK was to have any chance of success, its institutional design needed to be informed by the failures of previous anti-corruption institutions and initiatives. It could not simply be a stopgap to quell public anger (Assegaf 2002: 136). A collection of part-time employees would not suffice, as the Joint Team experience showed; and its officers and employees would need the highest integrity. It required budgets and facilities adequate to perform its tasks. The institution would also need independence so that the politically powerful could not avoid its scrutiny. It also needed to select its own cases.

The primary function of the KPK could not be merely to coordinate existing law enforcement. Powers to recommend investigation and prosecution would not suffice. Most importantly, the KPK needed to be able to investigate and prosecute its own cases. A truly independent judicial body was required to adjudicate the cases the KPK brought. Ordinary police, prosecutors and courts needed to be excluded from participating in corruption cases – or at least the cases that the KPK decided to pursue.

As the remainder of this chapter shows, the 2002 KPK Law provided many of these institutional necessities and, in fact, went further, granting the KPK investigatory powers far beyond those enjoyed by ordinary law enforcers. I now turn to discuss these and several other institutional characteristics of the KPK and ACC.

The KPK's institutional design

The KPK Law establishes the KPK as an independent state institution funded from the national budget. When performing its tasks and exercising its powers, it is to be free from outside influence, including from the executive, judiciary, legislature and parties involved in corruption cases. The KPK sits in Jakarta, though it can establish provincial representatives, and is to operate throughout Indonesia (Articles 2–3, 19, 64).

Personnel and organisation (Articles 21–27, 34, 39, 43 of the KPK Law)

The KPK has five commissioners (*pimpinan*), a four-member advisory team (a group of experts who advise the KPK on its tasks and powers), and several hundred employees.[23] Of the five commissioners, one is chairperson and four are deputy chairpersons. The commissioners are state officials, are to work collectively (*bekerja secara kolektif*), and are ultimately responsible for the KPK. Commissioners hold office for four years and can be re-elected for one further term. The commissioners select the advisory team,[24] and appoint and dismiss KPK section heads, secretariat heads, sub unit heads, and other employees. The KPK is assisted by a general secretariat led by a Secretary-General, who is appointed by the president, but is responsible to the commissioners. The General Secretariat has Human Resource, Planning and Finance, General, Legal and Community Relations bureaus.

The KPK has four departments: Prevention; Enforcement; Information and Data; and Internal Supervision and Community Complaints. Within the Prevention Department, there are several units, including Registration and Audit of State Officials' Assets (into which the Commission for the Inspection of State Officials' Assets (KPKPN) was subsumed), Gratification, Community Education and Service, and Research and Development. The Investigation and Prosecution units exist within the Enforcement Department. The Information and Data Department has Information and Data Management, Development of Working Networks between the Commission and Other Institutions, and Monitoring units. Finally, the Internal Supervision and Community Complaints Department houses separate Internal Supervision and Community Complaints units.

The KPK appoints and dismisses its own criminal investigators and prosecutors. Virtually all of them are secondments from the ordinary police force and the public prosecution. Unsurprisingly, this has been criticised for defeating perhaps the most significant purpose of the KPK's establishment mentioned above: taking corruption cases away from ordinary law enforcers.

Whilst sourcing employees from existing law enforcement institutions is clearly far from ideal given the concerns about their professionalism mentioned above, there seems to be no alternative, at least in the short-to-medium term. The KPK simply has no other pool of qualified and experienced police and prosecutors from which to draw. Fortunately, using ordinary police and prosecutors does not appear to have deleteriously affected the KPK's work or performance.

This is probably because of its rigorous selection process. Positions within the KPK have, at least before the Antasari, Bibit and Chandra sagas, been highly sought-after. According to Bolongaita (2010: 16–17), for example, in a 2008 recruitment round for general staff positions, the KPK received more than 28,000 applications for 85 positions. With such fierce competition, the KPK has been able to be very selective. Most KPK employees are, in fact, recruited by a private-sector human resources firm, which receives online applications, runs background checks, conducts technical and psychological tests and puts forward

a shortlist of candidates to KPK commissioners (Bolongaita 2010: 16–17). Use of outside recruitment services, the KPK attests, ensures that the investigators and prosecutors it employs have high integrity and professionalism (Bolongaita 2010: 16–17). Police and prosecutors are employed full-time on fixed contracts, and must take leave from their positions within the police force and public prosecution while working for the KPK.

KPK commissioners: appointment, prohibitions and dismissal (Articles 29–36)

Appointment. To be appointed as a KPK commissioner, candidates must:

- be an Indonesian citizen;
- believe in Almighty God;
- be mentally and physically healthy;
- hold a law degree or another degree, and have at least 15 years' expertise and experience in law, economics, finance or banking;
- be between 40 and 65 years old;
- have never performed a reprehensible act (*perbuatan tercela*);
- be capable, honest, have high moral integrity, and have a good reputation;
- not be a political party official;
- be willing to relinquish other offices, or refrain from working in their profession, while working at the KPK and
- be willing to declare their assets in accordance with the law.

Commissioners also undergo an extensive selection process. The KPK Law requires the government to establish a committee, comprising government officials and community figures, to help select candidates.[25] The committee publicly advertises vacant positions, accepts applications, assesses formal eligibility against the selection criteria, and then announces applicants' names for public comment. Candidates undergo background checks and psychological and competence testing, and are required to write an essay about themselves to demonstrate their integrity (Schütte 2011). Within 14 working days of receiving the names, the president is to present the national parliament with a list of twice as many candidates as there are vacancies. A parliamentary commission then subjects these candidates to a fit and proper test (*uji kelayakan*), chooses the commissioners and selects a chairperson from amongst them. Parliament then conveys its selections to the president for inauguration. This process took between four and six months in the 2003 and 2007 commissioner selection rounds and to replace Antasari in 2010 (Schütte 2011).

The selection process has been criticised, particularly for giving the 'final say' on appointments to parliamentarians and the president, whom the KPK can investigate and prosecute. Concerns have, quite rightly, been raised that they might select only candidates who have committed to refrain from pursuing them. Yet it is hard to imagine a process more rigorous and public. While there is

scope for political appointments, in practice there is very little, if any, evidence suggesting that commissioners have been coopted (Schütte 2011).

Before taking office, KPK commissioners must take an oath or pledge before the president, according to their religion. The oath includes a promise not to offer or receive anything from any person in return for performing or not performing their official duties. Commissioners must also pledge loyalty to the state ideology (*Pancasila*),[26] the Constitution and Indonesian laws and vow to:

> be sincere, careful, objective, honest, unwavering, just and to maintain their independence from interference from any party; not discriminate on the basis of rank, ethnicity, religion, race, gender or certain groups; and to perform their functions to the best of their abilities, fully accountable to Almighty God, the community, the nation and the state.

Prohibitions. Once appointed, KPK commissioners, advisers and employees must not:

- have direct or indirect contact, for whatever reason, with a suspect or other party connected with a corruption case the KPK is handling;
- handle a corruption case if the alleged perpetrator is related to them by blood or marriage; and
- be a commissioner (*komisaris*) or director of a company or foundation, the manager of a cooperative, or work in any profession or any activity relating to those positions.

Termination. Commissioners can resign or be dismissed if:

- they die;
- their term of office expires;
- they become a defendant in a criminal case;
- they are continuously impeded from performing their tasks for more than three months;
- they step down; or
- they are punished under the KPK Law.

Commissioners whom police formally charge on suspicion of committing a crime are to be suspended from office. If a vacancy arises amongst KPK commissioners, the president is to put forward replacement candidates to the national parliament, using the appointment procedures mentioned above. These suspension, termination and replacement procedures were the subject of much controversy in the Bibit and Chandra saga, discussed in Chapter 5.

KPK commissioners breaching any of the above prohibitions face five years' imprisonment. The same punishment applies to KPK employees who directly or indirectly, without good reason, have contact (*mengadakan hubungan*) with a

suspect or another party involved in a corruption case the KPK is pursuing; handle cases involving their relatives, by blood or marriage; or work as a commissioner or director of a company, foundation, or cooperative, or in another professional office or activity related to that office.

To deter KPK employees from engaging in corruption themselves, all KPK employees convicted of corruption have the criminal penalties applied against them increased by one third of the generally applicable punishment.

KPK's tasks, powers and obligations

The KPK's corruption-combating tasks fall within four broad categories: coordinating and supervising relevant agencies and institutions; investigating and prosecuting corruption cases; preventing corruption; and monitoring state governance. The KPK also has broad powers to regulate its policies and procedures, which it exercises largely by issuing KPK Commissioner Decrees.

Coordination and supervision (Articles 7–9). Using its powers to coordinate corruption investigations and prosecutions, the KPK can request information and reports about the activities of agencies involved in corruption eradication, such as the police force and public prosecution. The KPK can also formally meet with those agencies and supervise, research and review their performance.

Perhaps the most important of its supervisory powers, however, is the KPK's ability to take over ongoing corruption investigations or prosecutions from ordinary police and prosecutors. The KPK can do this if:

- a community report or complaint indicates that police or prosecutors have failed to pursue the case;[27]
- the investigation or prosecution of the case has stalled or has been delayed without good cause;
- the case has been handled in a way that protects the real perpetrator;
- the handling of the case has itself involved corruption;
- interference from the executive, judiciary or legislature has impeded the handling of the case; or
- any other circumstances exist which, according to police or prosecutors, make the case difficult to handle.

Once the KPK decides to take over a case, police or prosecutors must hand over the suspect and all evidence and documentation within 14 working days of the KPK requesting them.[28]

Investigating and prosecuting corruption cases (Article 11). The KPK can investigate and prosecute corruption that ordinary police and prosecutors have not yet pursued. Again, the KPK's powers are not unfettered. To investigate or prosecute, the case must:

- involve law enforcers (traditionally interpreted to include police, prosecutors and judges), state officials, or a party that has collaborated with law enforcers or state officials;
- draw the attention of, and disturb, the community; or
- involve a loss to the state of at least one billion rupiah.

Regarding investigatory and prosecutorial powers (Articles 12, 38–39, 46, 52), whether taking over the case from ordinary police or prosecutors, or initiating the investigation or prosecution itself, the KPK is, as a general principle, subject to the Indonesian Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*) and the 1999 Corruption Law on matters such as arrests, detentions, searches and seizures. These laws apply also to ordinary police and prosecutors.

The KPK Law gives the commission additional powers not enjoyed by ordinary police and prosecutors. These include powers to:

- tap and record conversations;
- order government agencies and institutions to prohibit someone travelling overseas;
- seek information from a bank or other financial institution about the financial position of a suspect or defendant;
- order a bank or other financial institution to block the account of a suspect, defendant or related party, if that account is thought to contain proceeds of corruption;
- order the superior of a suspect to suspend the suspect from office;
- request a suspect's or defendant's asset and tax data from a relevant agency;
- suspend a financial or commercial transaction, or another contract;
- temporarily revoke permits, licenses or concessions held or owned by someone suspected, on the basis of sufficient initial evidence, of being involved in corruption that the KPK is investigating;
- request the assistance of Interpol Indonesia or foreign law enforcement agencies to conduct searches, arrests and seizures of evidence overseas;
- seek assistance from the police or other related agencies to conduct arrests, detentions, searches and seizures in ongoing corruption cases; and
- on strong suspicion of sufficient initial evidence, confiscate evidence without court authorisation.

Unlike ordinary law enforcers, the KPK does not need the permission of a suspect's superior to commence investigations (Bolongaita 2010: 10, 13).

Critically, the KPK lacks power to issue Cessation of Investigation Orders (*Surat Keputusan Penghentian Penyidikan*, or SKPP). In other words, once the KPK formally names a person as a suspect (*tersangka*), it cannot drop the case. It must proceed to trial. The significance of this limitation upon the KPK's powers is discussed in Chapter 2. Further, KPK prosecutors must proceed to trial within 14 days of receiving a complete case file of evidence from investigators.

Obligations (Articles 5, 15, 20). The KPK must:

- protect witnesses and informants;
- provide information to the community about the corruption cases it has prosecuted;
- subject itself to performance appraisals; and
- prepare annual reports and financial acquittals and present them to the President, national parliament and National Audit Board.

KPK officials must also uphold their oaths and, when exercising their powers, must follow several aspirational principles: legal certainty, openness, accountability, the public interest, and proportionality.

Prevention and monitoring; assessing gratifications (Articles 13–14, 16–17). These tasks are less relevant to this book but are mentioned for completeness. Under its corruption-prevention mandate, the KPK has the power to:

- register and investigate state officials' asset reports. As mentioned, the KPKPN previously performed this function;
- run anti-corruption education programs;
- conduct public anti-corruption campaigns; and
- engage in bilateral and multilateral cooperation for corruption eradication.

The KPK can examine the administrative management systems of all state institutions, suggest reforms to those institutions, and report to the president, national parliament and National Audit Board if those suggestions are ignored.

The KPK is also responsible for logging and assessing the gifts or gratifications (*gratifikasi*) that public servants and state officials receive in the course of their official duties. Every public servant and state official who receives a gratification must report it to the KPK using procedures set out in the Law. The KPK then decides whether the gratification becomes state property.

Cooperation and conflict

The KPK does not replace ordinary police and prosecutors in corruption cases. Rather, both the KPK and ordinary law enforcement have jurisdiction over the same types of cases. How does the KPK Law address the jurisdictional overlap? On the one hand, the General Elucidation to the KPK Law seems concerned to downplay it. The Elucidation implores the KPK to treat existing institutions as 'conducive counterparts' (*"counterpartner" yang kondusif)*. It declares that the KPK must not monopolise investigations and prosecutions, but rather operate as a 'trigger mechanism' to strengthen existing institutions in combating corruption and supervise and monitor them. Only in limited circumstances should the KPK take over investigations and prosecutions. The General Elucidation even claims – rather hopelessly, it seems – that the KPK Law regulates the KPK's powers

'carefully so that there is no overlap between the jurisdiction of these institutions'.

On the other hand, the KPK Law clearly comes down in the KPK's favour. As mentioned, the KPK can initiate its own investigations and, in some circumstances, take over existing investigations. The Law gives the KPK even greater control, however. For example, if police or prosecutors discover that they are handling the same case as the KPK, then the KPK Law requires them to immediately cease their involvement. And, once the KPK begins investigating or prosecuting a corruption case, police and prosecutors automatically lose jurisdiction. The KPK can, however, hand over the case to ordinary police or prosecutors. If this happens, the police or prosecutors must 'report investigation developments' to, and 'continually coordinate' with, the KPK.

Further, ordinary police and prosecutors who begin investigating corruption cases that the KPK has not yet investigated must report their investigations to the KPK within 14 days of commencing them. It seems that police and prosecutors routinely comply with this obligation and that the KPK takes it seriously. In 2009 alone, the KPK examined 528 Commencement Reports from prosecutors and 88 from police. Of these, the KPK sought information on further developments in 137 cases and took over 58 prosecutions (Komisi Pemberantasan Korupsi 2009: 16). Presumably, this requirement is linked to the KPK's monitoring and supervision functions, and is intended to give the KPK notice of investigations so that it can decide whether to take them over.

It is widely understood that police and prosecutors resent that the KPK, despite being a new institution, has greater powers of investigation than they possess; and that it can unilaterally trump their jurisdiction in corruption cases. This resentment, it seems, has made police and prosecutors willing allies in endeavours, discussed in subsequent chapters, to weaken, or even bring down, the KPK.

The ACC (Articles 53–62)

The ACC, also established under the 2002 KPK Law, began operating in 2004, with jurisdiction to investigate and decide the corruption cases that the KPK prosecuted. The court was first established within the Central Jakarta District Court, though its premises were not in the Central Jakarta District Court complex. Its jurisdiction extends Indonesia-wide, even extra-territorially for Indonesian citizens.

When it was established, its trial processes were governed by the Code of Criminal Procedure (KUHAP), the 1999 Anti-Corruption Law and the 2002 KPK Law. (The court and its processes are now also governed by the 2009 Anti-Corruption Court Law (ACCL), discussed in the Conclusion of this book.) As initially conceived, its processes were designed to differ in two important ways from the general courts. First, as mentioned, rather than having three-judge panels, ACC hearings employed five-judge panels. Although proceedings were usually chaired by a general court career judge, three judges on each panel were

ad hoc judges. These are legal experts, such as academics, practitioners and retired judges, brought in to sit alongside career judges in ACC trials.[29] The rationale was that they would be more likely to be independent, not having worked within the existing law enforcement apparatus.

The use of ad hoc judges in general, and three ad hoc judges in particular, was a significant development. Several ACC decisions were split along ad hoc and career judge lines (Fenwick 2008: 414), with the majority ad hoc judges convicting the defendant and the minority career judges declaring that they would have acquitted or imposed a lower sentence. Appeals could be lodged with an ACC High Court, and then with the Supreme Court, again with three ad hoc and two career judges on the panel.

A second significant difference between the procedures of the ACC and the general courts was that the KPK Law established strict time limits within which corruption cases must be decided. At first instance, the ACC was required to decide cases within 90 days of the case being lodged with it. On appeal, the ACC High Court had 60 days after lodgment to decide the case. The Supreme Court had 90 days to decide appeals.

The KPK Law required that district court judges serving on the ACC be selected by the Supreme Court Chief Justice and meet the following prerequisites:

- have at least ten years' judicial experience handling corruption cases;
- be capable and have high moral integrity; and
- never have been subjected to disciplinary penalties.

The Law stipulated that ad hoc ACC judges were to be appointed and dismissed by the president on the Supreme Court Chief Justice's recommendation. They must also:

- be an Indonesian citizen;
- be devoted to Almighty God;
- be physically and mentally healthy;
- have a law or other degree and have expertise and at least 15 years' experience in the field of law;
- be at least 40 years of age;
- have never performed a reprehensible act;
- be capable, honest, have high moral integrity, and have a good reputation;
- not be a political party official; and
- be willing to relinquish their profession or other office while working as an ACC judge.

Conclusions

It is clear, then, that the KPK and ACC, at least as conceived in the 2002 KPK Law, were designed to be effective. Their employees were carefully selected;

their powers of investigation, prosecution and adjudication were strong; and their independence and professionalism guarded. Further, they had a broadly worded Anti-Corruption Law to help them secure convictions.

For the first time in modern Indonesian history it seemed that the state had formed anti-corruption institutions with a realistic chance of successfully handling corruption cases. Yet, as subsequent chapters highlight, the KPK has, at various times in its short history, lacked something that legislation of itself cannot provide: continuing political goodwill, and the support of other institutions – including the police, prosecution and courts. It has this in common with the previous anti-corruption institutions and initiatives mentioned above. As indicated, this lack of support is hardly surprising: after all, the KPK's main function was to break down the corrupt networks of which many political figures and law enforcers are part.

The KPK's institutional design has two significant flaws, however. These flaws are that its commissioners can be suspended once police formally charge them and dismissed once prosecutors bring them to trial. As we shall see, these are powerful trump cards that police, in particular, have been willing to use in the Antasari, Bibit and Chandra cases, which I discuss in Chapters 4 and 5.

2 The KPK and ACC's performance

2005–2010

In Chapter 1, I argued that the KPK and ACC were, unlike most of their predecessors, designed to make corruption investigations, prosecutions and trials easier and more likely to yield a conviction. In this chapter, I test whether the design of the KPK and ACC has, in practice, had these effects, by briefly assessing their performance from 2005 (when the ACC began deciding cases) until the end of 2010. I discuss the praise and criticism their performance has drawn, and outline high-profile cases they handled, most of which occurred from 2008.

Though the KPK and ACC have enjoyed significant success compared to their predecessors, their contributions should not be overestimated. I show this by comparing the number of KPK investigations and prosecutions with those of ordinary prosecutors. I also discuss Indonesia Corruption Watch's (ICW) comparisons of the conviction rates and sentences of the ACC and the general courts, but question their utility as measures of the general courts' failures and the ACC's successes.

I have divided my account of the cases the KPK and ACC have handled into two periods, corresponding roughly with the terms of office of the KPK's first two chairpersons. In the first period, 2005–2007, Taufiqurrahman Rukie was chairperson. I argue that, in these years, the KPK focused on consolidating its position by gaining experience, establishing a track record of convictions and attracting public support. Its targets were generally limited to mid-high-level government officials, both national and provincial, though with some notable exceptions. Pushback against the activities of the KPK and ACC was limited to ambivalent political support and constitutional challenge, described in Chapter 3. The KPK also drew protest from reformists for not targeting 'big fish' – powerful political players whose corruption involved massive losses to the state.

In the second period, 2008–2009, under the chairpersonship of Antasari Azhar, an emboldened KPK began pursuing higher-level politically powerful figures, including serving and former ministers and national parliamentarians. For this, the KPK faced much stronger resistance, which it found harder to deflect and absorb, as discussed in Chapters 4, 5 and 6. This period witnessed a significant spike in public support for the KPK but continuing political ambivalence, until SBY lent his support during the Bibit and Chandra saga, discussed in Chapter 5. From 2009 in particular, the KPK and individual commissioners bore

the full brunt of attack. This began when Antasari was charged with murder, and intensified when he was convicted and Bibit and Chandra were charged with bribery. With three of five commissioners suspended and much of the KPK's energy devoted to defending Bibit and Chandra, the KPK and reformists alike complained that the KPK had been distracted from its core functions.

Throughout this challenge and change, however, the KPK and ACC 'team' have maintained one constant: a 100 per cent conviction rate. Anti-corruption activists, such as ICW, have used this conviction rate to proclaim the KPK and ACC's success, particularly in light of the general courts' conviction rate in corruption cases – around 50 per cent, according to ICW estimates. These statistics might be broadly indicative, but in this chapter I aim to show that their value should not be overstated.

The case statistics and other figures cited in this chapter have been drawn from a number of sources and I have made concerted efforts to verify and crosscheck them. The data on KPK investigations and prosecutions were compiled from the KPK's Annual Reports of 2004–2009. ACC conviction data were also obtained from these Annual Reports and were then crosschecked with a compilation of ACC convictions contained in *Kompas* (2009a). I obtained data on general prosecution rates in corruption cases from the Attorney-General's website (www.kejaksaan.go.id). However, despite extensive searching, I was unable to obtain complete official general court conviction rates or sentencing statistics for corruption cases. I rely in this chapter upon 2008–2009 figures the Supreme Court Chief Justice provided in a press conference in late 2010. I also refer to ICW figures, but note that their correctness has been challenged, particularly by the Supreme Court.

2005–2007

Perhaps the most prominent criticism against the KPK in 2005–2007 was levelled by civil society organisations such as ICW, and respected legal commentators. They claimed that the KPK was toothless: it chose 'easy' cases that it knew it could win and actively avoided Indonesia's more notorious scandals involving powerful political players. The KPK had, for example, failed to effectively investigate and prosecute for corruption former President Soeharto, his inner circle and family; those involved in the bank liquidity scandals in the aftermath of the 1997 financial crisis; and reforestation fund corruption (Aspandi 2002: 189–90).

These criticisms had some merit. As Table 2.1 shows, before 2008 the KPK focused on regional politicians, officials working in state-owned enterprises, private-sector businesspersons, and mid-level national bureaucrats.

However, I argue that, overall, these criticisms of the KPK's case selection were overstated. In this period the KPK did, in fact, claim several quite high-profile scalps. Several are discussed in detail in Chapter 3, so I will only briefly mention them here. In its first case, the KPK investigated and prosecuted Abdullah Puteh, former Governor of Aceh. The ACC convicted him for marking up, in 2002, the price of a Russian helicopter by over $US 1 million. On appeal, a

Table 2.1 KPK convictions 2005–2007

Position when corruption occurred	*Year of conviction at first instance*		
	2005	*2006*	*2007*
Parliamentarians (national and local)	0	0	0
Officials of the Central Bank	0	0	0
Regional heads (governor, mayor, regent)	2	0	4
Ambassadors, consular and immigration officials	0	2	3
Officials of state-owned enterprises	4	8	0
Law-enforcement officials	0	1	0
Business people	0	7	4
Ministerial officials and public servants	4	3	7
Members of the State Audit Agency	0	1	0
Lawyers	1	1	0
Officials of the Supreme Court	0	4	0
Officials of the High Court	2	0	0
Political Party Officials	0	0	0
Total	13	27	18

Sources: Compiled from Komisi Pemberantasan Korupsi 2004; Komisi Pemberantasan Korupsi 2005; Komisi Pemberantasan Korupsi 2006; Komisi Pemberantasan Korupsi 2007; Komisi Pemberantasan Korupsi 2008; Komisi Pemberantasan Korupsi 2009a; *Kompas* 2009a.

Supreme Court ACC panel ultimately sentenced him to ten years' imprisonment. During this period, the KPK also snared its first former national parliamentarian – Theo Toemion. He was convicted of misusing funds allocated for projects for Indonesian Investment Year 2003–2004 while serving as head of Indonesia's Investment Coordination Board (*Badan Koordinasi Penanaman Modal*). (He is not categorised as a parliamentarian in the Table 2.1, because he had retired from parliament when this corruption occurred.)

Other relatively high-profile scalps included members of the National Electoral Commission who had procured goods and services necessary for the 2004 national and local elections. Those investigated and convicted included Nazaruddin Sjamsuddin, the former head of the commission; Rusadi Kantaprawira, head of the commission's committee in charge of procuring ink needed for the election; and Achmad Rojadi, secretary of that committee. The KPK also successfully pursued several former ministers, including former Fisheries Minister Rokhmin Dahuri and former Religious Affairs Minister Said Agil Husin Al Munawar. The ACC sentenced Dahuri to seven years' imprisonment in mid-2007 and Munawar to five years, for embezzling funds from their respective ministries.

Why, then, did the KPK avoid Indonesia's biggest so-called corruptors? A widely held view was that the KPK's lack of authority to issue SP3s explained its case selection (Fenwick 2008). As discussed in Chapter 1, if the KPK proceeds beyond initial investigations, it must proceed to trial, even if new evidence comes to light that weakens or destroys its case. This, it is claimed, made the KPK reluctant to try cases that it might have difficulty proving in court. This

explanation does not withstand scrutiny, however. Prosecutors the world over are required to make difficult decisions about whether to risk pursuing cases in which convictions are not guaranteed but which warrant trial because of the seriousness of the alleged crimes or the perceived culpability of the alleged perpetrators. But is new evidence really more likely to emerge in 'big' corruption cases after the KPK has progressed beyond this point of no return? These types of cases might be more complex, involving bigger sums and more players. But surely these cases merely require that the KPK move beyond initial investigations only with care – something that it must do in all cases.

Others claim that the KPK is, to some degree, held back because it can choose from only the cases it is 'given'.[1] Although the KPK conducts some investigations on its own initiative, for many it depends on government institutions and individuals coming forward with allegations or evidence of corruption. For example, in a number of cases, the National Auditing Body and the Financial Transactions Reporting and Analysis Centre have informed the KPK of financial discrepancies they have uncovered, upon which further KPK investigations were based. Fearing political retribution, these important 'sources' might be reluctant to come forward with evidence against corruptors with political connections.

In my view, the most compelling explanation for the KPK's case selection is that it reflects astute strategy and caution. Far from reflecting timidity, the KPK avoided cases that might be met with the strong political resistance that so-called 'big fish' could muster. If the KPK pursued them too soon after its establishment, its investigations might have been marred by inexperience. It might also have lacked the institutional and political strength and public support necessary to withstand efforts to destabilise or disband it.

Perhaps the KPK had learnt from the mistakes of others. Several post-*Reformasi* institutions established to embark upon legal reforms have not treaded so carefully, prompting a political backlash strong enough to render them impotent. The Judicial Commission, for instance, was initially established to investigate judicial (mis)conduct and to propose appointments to the Supreme Court. Within only a few years of its establishment, the commission was hobbled after it publicly targeted previously 'untouchable' senior members of Indonesia's Supreme Court in its investigations. The Supreme Court responded fiercely, asking the Constitutional Court to prohibit the Judicial commission from investigating judges on the basis that such scrutiny might affect judicial independence when deciding cases. The Constitutional Court agreed, in effect prohibiting the Judicial Commission from examining the decisions of any Indonesian judge. This left the commission with the sole and rather toothless function of proposing names of judges to fill vacancies on the Supreme Court – advice which the Court almost routinely ignores (Butt 2009a).

The ACC: leniency and bias?

Anti-corruption activists and institutions also criticised the ACC, despite its conviction rate. One complaint was that the ACC did not impose sufficient penalties

upon those it convicted, some of whom it found guilty of causing very large losses to the state. For example, the court has not imposed life imprisonment or the death penalty despite their availability under the ACL. The longest term of imprisonment the ACC had imposed at time of writing was 20 years – in the Urip case, discussed below.

There is merit in this criticism, too, particularly in light of the strong political and legal rhetoric – including in the KPK Law itself – emphasising corruption as an extraordinary crime and the importance of taking strong action against it. The ACC's sentences are, however, conspicuously tougher than those imposed by general courts. In 2008, the average sentence imposed by the ACC was just over four years' imprisonment (ICW 2008: 3). This is much higher than the ICW-estimated general court average in corruption cases of six months, discussed below.

The ACC's conviction rate itself has drawn complaints from legal commentators – notably lawyers whose clients have been convicted in the ACC, but also human rights lawyers – who have claimed that the ACC must have forgone the presumption of innocence in order to convict in all cases (Syamsuddin 2007).[2] One Indonesian legal expert, Professor Indriyanto of the University of Indonesia (who was a legal advisor for Abdullah Puteh when he was tried before the ACC), has claimed that ACC judges are swayed by public pressure and the press to convict defendants, even in the face of unconvincing evidence of guilt (*Hukumonline* 2009a). In a similar vein, a lawyer who has appeared in several ACC trials claimed that, from his experience, the ACC was unfair and biased.[3] He stated that ACC court judges did not look for the 'truth', as required by Indonesian law, but rather looked for 'guilt'. He claimed also that some of his clients had asked him to temper the vigour with which he represented them, fearing that putting up too much of a fight would cause them additional 'problems' during investigations and trials and might result in an increased sentence.

Some have blamed these perceived problems on the ACC's ad hoc judges, claiming that they are biased against defendants and lack the judicial knowledge and skills to effectively preside over trials and hand down impartial and well-reasoned decisions. Allegations of secret meetings between ad hoc judges and the KPK have fueled these criticisms (*Kompas* 2007a).

2008–2009

As Table 2.2 shows, from 2008, under Antasari's chairpersonship, the KPK began targeting parliamentarians, ministers and central bank officials.

Law enforcers

Legal commentators have regularly criticised the KPK for a perceived reluctance to pursue law enforcers. This is usually explained as a by-product of the KPK's need to employ ordinary police and prosecutors. It is presumed that they are likely to remain loyal to their colleagues and superiors even after they commence work

Table 2.2 KPK convictions 2008–2009

Position when corruption occurred	*Year of conviction at first instance*	
	2008	*2009*
Parliamentarians (national and local)	2	8
Officials of the Central Bank	3	4
Regional heads (governor, mayor, regent)	6	6
Ambassadors, consular and immigration officials	5	9
Officials of state-owned enterprises	2	1
Law-enforcement officials	2	0
Business people	2	9
Ministerial officials and public servants	9	8
Members of the State Audit Agency	0	0
Lawyers	0	0
Officials of the Supreme Court	0	0
Political Party Officials	0	1
Total	31	46

Sources: Compiled from Komisi Pemberantasan Korupsi 2004; Komisi Pemberantasan Korupsi 2005; Komisi Pemberantasan Korupsi 2006; Komisi Pemberantasan Korupsi 2007; Komisi Pemberantasan Korupsi 2008; Komisi Pemberantasan Korupsi 2009a; *Kompas* 2009a.

at the KPK, particularly because they fear rebuke for disloyalty when they return to their respective institutions after their contract with the KPK expires.

Though there is undoubtedly some truth in this criticism and explanation, the KPK has, in fact, successfully prosecuted a number of law enforcers. Indeed, one of its most heralded cases involved a prosecutor – Urip Tri Gunawan.

Urip Tri Gunawan

Urip had headed a 35-member prosecution team investigating corruption in the Bank Indonesia Liquidity Assistance (BLBI) programme. During the 1997 crisis, before Suharto's resignation, the central bank disbursed over Rp600 trillion in BLBI funds to save ailing banks. However, over Rp450 trillion (US$40 billion) of this is thought to have been embezzled (Wardany 2010). One of the banks Urip's team investigated was Bank Dagang Nasional Indonesia (BDNI), the second-largest recipient of BLBI funds (Guerin 2006). Sjamsul Nursalim, former director of BDNI, was suspected of embezzling Rp28.4 trillion.

However, prosecutors dropped the investigation into Nursalim, citing lack of evidence, and the KPK decided to take over the case. Responding to a tipoff, KPK investigators caught Urip red-handed receiving a bribe of Rp6 billion (around US$660,000) from Artalyta Suryani, a long-time associate of Nursalim's, at Nursalim's home in March 2008 (*Jakarta Post* 2010a; *Jakarta Post* 2008b; Forbes 2008).

For this, the ACC found Urip guilty of breaching Articles 12(b) and 12(e) of the ACL, which prohibit public officials receiving bribes in return for performing a task in their official capacity (*Hukumonline* 2008c; *Hukumonline* 2008b).

The court found that, in return for the payment, Urip had collaborated with Suryani to help Nursalim avoid attending the Attorney-General's Office for questioning. Together, they had drawn up a formal declaration that Sjamsul could not attend because he was being treated for health problems in Singapore (where, incidentally, he remains at the time of writing). The court found, therefore, that Urip had used his position to help protect Nursalim.

The ACC sentenced Urip to 20 years' imprisonment – a sentence upheld by the Jakarta High Court and the Supreme Court on appeal (*Kompas* 2009c; *Hukumonline* 2009d). This is the heaviest sentence the ACC has handed down at time of writing (Kustiani 2008). (The ACC also convicted Artalyta Suryani and sentenced her to five years' imprisonment. Her prison stay was controversial. When Denny Indrayana, a member of the President's Judicial Mafia taskforce, conducted a surprise inspection of her cell, he found that she had installed air-conditioning, acquired a large television, stereo, refrigerator and karaoke facilities, and even employed a beauty therapist and maid (*Jakarta Globe* 2011).)

Ibrahim and Wijanarko

In early 2010, the KPK caught Administrative Court Judge Ibrahim receiving a bribe from a lawyer acting for a party in a land dispute over which he was presiding (*Jakarta Globe* 2010). The ACC convicted him and imprisoned him for six years in August 2010. More recently, the KPK charged Tangerang prosecutor Dwi Seno Wijanarko for allegedly extorting Rp50 million from a witness involved in a case he was handling. He allegedly threatened to have the witness named as a defendant in the case (*Hukumonline* 2011g). At time of writing, Wijanarko was awaiting trial.

Irwady Joenoes

The ACC also convicted former Judicial Commission member Irawady Joenoes in March 2008 for receiving a bribe. Though the Judicial Commission is not a 'law enforcement' institution, as mentioned its tasks include supervising judges to detect impropriety, including corruption. The conviction of one of its own members for corruption is, therefore, significant. The ACC found that Joenoes had accepted a US$30,000 bribe from Freddy Santoso, a landowner from whom the Judicial Commission bought land for its new office. After exhausting his appeals, Joenoes was sentenced to six years' imprisonment. Joenoes has always protested his innocence, arguing that he was attempting to snare Santoso himself when the KPK caught him. Santoso was also convicted and sentenced to four years in prison in February 2008 (*Hukumonline* 2010d; *Hukumonline* 2010a; *Kompas* 2008a; *Kompas* 2008b; *Jakarta Post* 2008a).

Parliamentarians

The traveller's cheque scandal

On 9 June 2004, the national parliament's Finance and Banking Commission selected Miranda Gultom as Bank Indonesia's Deputy Governor by a majority of 41 members to 13. Just over four years later, on 4 July 2008, Agus Condro Prayitno, a former member of that commission, admitted that he, and most commission members, had each received Rp500 million in traveller's cheques to vote for Gultom. Financial Transactions Reporting and Analysis Centre investigations revealed that 450 traveller's cheques, worth Rp50 million each, totalling Rp24 billion (US$2.6 million), were purchased on the day that Gultom was voted in. The centre also discovered that those traveller's cheques had been cashed by commission members or their relatives (Hidayat and Febriyan 2011).

By June 2009, the KPK had named four former parliamentarians as suspects: Udju Djuhaeri, of the now defunct Military Police faction and former State Auditor with the Supreme Audit Agency (BPK); Endin Soefihara of the United Development Party (PPP); Dudhie Makmun Murod of the Indonesian Democratic Party of Struggle (PDI-P); and Hamka Yandhu of the Golkar party. All were detained and tried separately in early March 2010 (*Hukumonline* 2010b). The ACC found each of them guilty of breaching ACL provisions prohibiting state officials receiving bribes and sentenced them to between two and three years' imprisonment (Budiartie 2010a; Budiartie 2010b; Mahbubirrahman 2010; Manggiasih 2010; *Tempo* 2010). They were also found to have distributed cheques to their party colleagues on the parliamentary committee.

All four claimed that Nunun Nurbaeti, a friend of Gultoms's and wife of former National Police Deputy Chief, Adang Daradjatun, helped dispense the traveller's cheques. To avoid confusion when being collected, the cheques were allegedly placed in shopping bags coded with the colour of the political party of the intended recipients – red for PDI-P, yellow for Golkar, green for PPP and white for the Military/Police faction (*Hukumonline* 2010c).

The KPK has called in Nurbaeti for questioning, and the ACC has summonsed her several times in various trials, but she has failed to appear (*Jakarta Post* 2010b). She is said to be currently residing in Singapore, with which Indonesia has no extradition treaty. Her family and lawyer say she is being treated there for what the *Jakarta Post* (2010e) describes as 'severe forgetfulness'. Neither she nor Gultom have been formally charged (Rayda 2010b; Sagita and Antara 2010; Siahaan and Rachman 2010).

In July 2009, the KPK publicly identified 26 more serving and former legislators as recipients of traveller's cheques that Djuhaeri, Soefihara, Murod and Yandhu collected and distributed. However, the KPK did not formally name them as suspects until 1 September 2010 and arrest them until early 2011, largely because it became preoccupied with the Bibit and Chandra saga (Hidayat and Febriyan 2011). Of the former committee members from the Golkar party, eight have been detained; two have been charged, but not detained due to ill health;

and one has died since allegedly receiving the bribe.[4] From PDI-P, 13 were detained and two have since died.[5] Two former parliamentarians from the PPP faction were detained (Septian 2011).[6]

Al Amin

The traveller's cheque scandal was not the only KPK investigation resulting in the conviction of a parliamentarian during this period. In 2008, the ACC found Amin, a member of the parliamentary committee overseeing forestry, agriculture and fisheries, guilty of receiving bribes for assisting with the conversion of conservation forests in Riau and South Sumatra. He was also found to have extorted money from two private companies for helping them win a tender to provide GPS equipment to the Forestry Ministry (*Jakarta Post* 2008d; *Jakarta Post* 2008c). For this he was sentenced to eight years' imprisonment.

Bank Indonesia

During this period, the KPK and ACC also handled several cases involving former officials of Indonesia's central bank – Bank Indonesia (BI). Defendants included former Governor Burhanuddin Abdullah; former Deputy Governors Aslim Tadjuddin, Bun Bunan, Hutapea, Maman Somantri and Aulia Pohan; former legal director Oey Hoey Tiong; and former head of the communications bureau, Rusli Simanjuntak (*Tempo English Edition* 2008: 43). Also implicated were Antony Zeidra Abidin and Hamka Yandhu – both former members of parliament's Finance and Banking Committee.

In November 2006, the National Audit Board (BPK) had reported to the KPK that, when auditing BI's annual report for 2004, it uncovered that BI had dispersed around Rp100 billion (approximately US$10 million) through its training institute, the Indonesian Banking Development Foundation (Kong and Ramayandi 2008: 30–31). The bank's Board of Governors had approved the dispersal at a BI Governors' meeting on 3 June 2003 (Hidayat *et al.* 2008: 40). Around two-thirds of it was allegedly used to fund the defence of several former BI officials involved in BLBI corruption scandals, including to bribe prosecutors and judges to ensure that cases were dropped or light sentences were obtained (Kong and Ramayandi 2008: 30–1). The remainder was channelled to members in the parliament's Finance and Banking Commission. At that time, the national parliament was considering legislation that might have required the bank to relinquish its supervisory function and regulatory control over the banking sector (Kong and Ramayandi 2008: 30–1). The payment was apparently intended to ensure legislation favourable to the bank.

In early 2008, the ACC convicted BI Governor Burhanuddin Abdullah and sentenced him to five years' imprisonment for misusing BI funds by approving the transfer. Deputy Governors Tadjuddin, Bunan, Hutapea, Somantri and Pohan were also convicted for approving the transfers and received sentences ranging from two to four and a half years. The ACC convicted Tiong and Simanjuntak

for handing over the money to four former BI officials implicated in BLBI scandals and to members of the Finance and Banking Commission. Both were sentenced to four years' imprisonment on 12 November 2008. The ACC convicted former parliamentarians Antony Zeidra Abidin and Hamka Yandhu in early 2008 for their roles in the affair. The ACC sentenced Yandu to three years and Abidin to four (*Kompas* 2009b; *Hukumonline* 2009c).

Aulia Pohan

Of course, for the KPK and ACC, senior BI officials and parliamentarians were high-profile scalps. However, perhaps most significant amongst them was Aulia Pohan. His daughter is married to the oldest son of President Susilo Bambang Yudhyono. He received the highest sentence of the BI Deputy Governors, partly because he was chairperson of the Indonesian Banking Development Foundation when, as a BI board member, he approved the transfer. The conviction and imprisonment of Aulia Pohan was a crowning achievement for the KPK and Indonesia's anti-corruption movement. It was the first time that someone in the family of the president had been prosecuted and jailed for corruption and, significantly, the president did not obstruct the process (Bolongaita 2010: 10).

Number of corruption investigations and prosecutions: the KPK and public prosecution compared

As Table 2.3 shows, from its establishment until 2009 the KPK conducted 290 pre-investigations (*penyelidikan*), had conducted or was conducting 180 investigations (*penyidikan*), and had prosecuted or was prosecuting 159 cases.

By contrast, in 2005–2009, ordinary prosecutors, national and provincial, investigated 4,396 cases and prosecuted 4,281 of them. (It is unclear, however, whether these statistics refer to the number of suspects investigated and defend-

Table 2.3 KPK investigations and prosecutions (2004–2009)

Year	*Pre-investigations*	*Investigations*		*Prosecutions*	
		Ongoing	*New*	*Ongoing*	*New*
2004	18		1		2
2005	31		19	2	17
2006	36	2	27	4	6
2007	68	8	21	10	14
2008	70	7	46	6	37
2009	67	15	34	29	32
Total	290	32	148	51	108

Sources: Komisi Pemberantasan Korupsi 2004; Komisi Pemberantasan Korupsi 2005; Komisi Pemberantasan Korupsi 2006; Komisi Pemberantasan Korupsi 2007; Komisi Pemberantasan Korupsi 2008; Komisi Pemberantasan Korupsi 2009a.

Table 2.4 Public prosecutor investigations and prosecutions in corruption cases

Year	*Corruption investigations*	*Corruption prosecutions*
2005	425	637
2006	454	611
2007	636	627
2008	1,348	1,114
2009	1,533 (81 national, 1,452 provincial)	1,292 (39 national, 1,253 provincial)
Total	4,396	4,281

Source: Attorney-General's Office website – www.kejaksaan.go.id.

ant prosecuted, or simply the number of cases, which might involve one or more suspects or defendants. In my analysis below, I presume the latter.)

These figures show that, despite its successes, the KPK has handled a minuscule proportion of Indonesia's corruption cases. In 2005–2009, the KPK investigated 179 cases and prosecuted 157 cases, whereas ordinary prosecutors investigated 4,396 and prosecuted 4,281. In percentage terms, the KPK investigated less than five per cent of all corruption cases investigated in 2005–2009 and prosecuted less than four per cent. Even in the KPK's 'biggest' year, 2008, in which it completed 53 investigations and 42 prosecutions, it handled less than four per cent of investigations and prosecutions.

The general and ACC courts: conviction rates compared

As mentioned, reformist groups such as ICW point to the ACC's 100 per cent conviction rate as a measure of the success of the ACC and the KPK. By contrast, commentators, including the ICW, have described the general courts as 'heaven' (*surga*) for corruptors (*Hukumonline* 2010k; *Hukumonline* 2009b), focusing on their acquittal rate and lenient sentences in corruption cases (Chalid 2001; Aspandi 2002: 189–93).

Sentences

ICW (2008) estimates that, between 2005 and 2008, Indonesian general courts tried 1,421 defendants on corruption charges. Of these, ICW claims, 659 were acquitted, and 291 received jail sentences of less than two years. In 2008, for example, 194 cases involving 444 defendants were decided in the general courts, with 159 at district, ten at appeal and 25 at Supreme Court levels. Of these 444 defendants, 167 were found guilty. However, 78 of them received a sentence of less than one year; 55 of between one and two years; and 18 of between two and five years. Only five were sentenced to between five and ten years' imprisonment; and only one was sentenced to more than ten years. According to ICW, the average general court sentence was just under six months, even though the ACL appears to impose a mandatory minimum sentence of at least one year for most offences.

In the first half of 2010, the average general court sentence in corruption cases was one year and 13 days (*Hukumonline* 2010k). Thirty-eight defendants received sentences of between one and two years, 30 of between two and five years, five of between five and ten years and one of more than ten years. One received a suspended sentence (*Hukumonline* 2010k). By contrast, as mentioned, ICW reports that the ACC's average sentence is four years.

Acquittals

ICW identified an increase in acquitals in general court corruption cases – from 22 per cent of corruption cases in 2005, to 31 per cent in 2006, 56 per cent in 2007, 62 per cent in 2008 and 59 per cent in 2009 (*Hukumonline* 2010k). Overall, in 857 corruption cases heard in 2005–2009, general courts acquitted around 50 per cent of the 1,965 defendants (*Hukumonline* 2010k; Diansyah 2009: 36).

According to ICW, in the first half of 2010, the general courts acquitted 91 of 166 defendants (around 55 per cent) in the 103 corruption cases brought before them (*Hukumonline* 2010n).[7] According to ICW, reasons for these acquittals included negligently or deliberately weak indictments; and judges 'finding' reasons to acquit. A startling basis for acquittals has been the defendant's return of the illegally obtained money to the state. In one case in which a local parliamentarian embezzled money from a city budget but returned it before trial, the presiding judges found that the return of the money meant that no loss had been caused to the state and that, therefore, the defendant's act did not fall within the definition of corruption (Wardany 2009).[8]

In late 2010, Supreme Court Chief Justice Harifin Tumpa publicly contested some of ICW's acquittal figures. According to Supreme Court statistics, he said, of the 1332 corruption cases submitted to first instance and appeal courts from 2008 and 2009, 63 (4.73 per cent) had not yet been decided, 1,055 (83.14 per cent) had led to convictions, and 214 (16.86 per cent) were acquittals (*Hukumonline* 2010t). During the same period, the Supreme Court acquitted only six defendants in 240 cases and in fact overturned 56 lower court acquittals (*Hukumonline* 2010n). Presumably the Supreme Court's acquittal figures are more accurate than ICW's because it has more direct access to court data.

(Quite apart from Tumpa's claims, the completeness, and thus accuracy, of the ICW's sentencing and acquittal figures are suspect. If the official general prosecutor statistics, mentioned above, are correct, then general public prosecutors brought over 4,000 corruption prosecutions in 2005–2009. Even assuming a significant backlog of corruption cases before the general courts, the ICW's figures seem to neglect almost three thousand cases. The Supreme Court has not, however, attempted to rebut the ICW's claims about pre-2008 acquittals and lenient sentences.)

Potential statistical inaccuracies aside, basing assessments of the performance of Indonesia's general courts on conviction rates and sentences seems misguided in any event. Doing so presumes that defendants are guilty if brought to trial,

and that if they are acquitted then judicial impropriety was the cause. This presumption is, however, deeply flawed, for two main reasons. First, prosecutors may have put forward a weak case. Under Indonesian law, as elsewhere, defendants are presumed innocent until proven guilty. Though judges have scope to independently call witnesses, the prosecution is primarily responsible for proving the defendant's guilt 'convincingly and legally' (*secara sah dan menyakinkan*) – Indonesia's equivalent to 'beyond reasonable doubt'. If the prosecution fails to do so, then the defendant must be acquitted. The Supreme Court has made comments to a similar effect in defence of its acquittals in corruption cases:

> It needs to be understood that not all cases brought before the courts have enough evidence. In these cases, no one can force a judge to convict the defendant for any reason.
>
> (*Hukumonline* 2010n)

Second, evidence of guilt adduced at trial might not withstand in-court examination. A primary objective of trials in Indonesia, as elsewhere, is to scrutinise relevant physical evidence and witness testimony pointing towards guilt or innocence. At trial, the defence might successfully challenge the evidence upon which the prosecution's case is based. For example, the credibility of a key prosecution witness might deteriorate under cross-examination.

Furthermore, corruption is, generally speaking, more difficult to pursue than many other types of crimes – it is a 'secret crime, [usually] carried out by powerful and often sophisticated perpetrators intent on silencing potential witnesses…' (Wagner and Jacobs 2008: 18; Pearson 2001: 39). Perpetrators often go to great lengths to prevent detection. Evidence is, therefore, often difficult to obtain. Low conviction rates in corruption cases are commonplace in most countries – even developed states (ADB and OECD 2006: 17).

Conclusion: reality check

Despite these setbacks, the KPK and ACC have, since 2008 at least, exceeded the expectations of most observers. They have, particularly since 2008, investigated, prosecuted and convicted prominent and politically strong defendants. These are indeed remarkable achievements in light of past failures discussed in Chapter 2. They had maintained a flawless conviction rate – at least until a 2011 cause discussed in the Conclusion to this book – and have imposed higher penalties than general courts. For this, they have built and retained immense public support.

Despite the successes of the KPK and ACC, however, their overall impact on corruption levels has been marginal at best. I have shown in this chapter that, since its establishment, the KPK handled less than five percent of the corruption cases pursued each year in Indonesia; the vast majority of cases have remained the responsibility of ordinary police and prosecutors. This means that most corruption cases still suffer from ordinary police and prosecutor corruption – the very problem that the KPK was established to circumvent, as discussed in

Chapter 1. And, though the KPK's activities are said to have made government officials 'think twice' before engaging in corruption, such claims are merely anecdotal.

It is difficult, of course, to verify the extent of any deterrent effect that the KPK and ACC might have had. In fact, some might argue, albeit also anecdotally, that despite the presence of the KPK and ACC, overall corruption levels have increased in Indonesia, due largely to decentralisation and improved judicial independence, as mentioned in Chapter 1. Worse, as the Conclusion to this book shows, a new ACCL, enacted in late 2009, jeopardises the continuation of even the moderate progress that the KPK and ACC have made to date.

3 Early pushback

From 2004–2007, pushback against the KPK and ACC played out largely in Indonesia's Constitutional Court. This court, established in 2003, has nine judges, drawn primarily from the ranks of former academics, politicians and judges. It is the first Indonesian court with power to review statutes – that is, to ensure that laws passed by Indonesia's national parliament comply with Indonesia's newly-amended Constitution (Article 24C(1) of the 1945 Constitution; Article 10(1) of Law No 24 of 2003 on the Constitutional Court). This is a powerful function: if the court decides that the statute under review contradicts the Constitution, it can strike down that statute, leaving it with no legal force.

The court is arguably the most competent judicial body that has existed in independent Indonesia, despite handing down some decisions with questionable reasoning (Butt 2007b). In contrast to the general courts, including the Supreme Court, the Constitutional Court has built and maintained a reputation for being independent, largely professional, 'clean' and active in exercising its judicial review powers (Butt and Lindsey 2008; Wrighter 2005; Stockmann 2007).

The court has been an oft-used forum for questioning the constitutionality of Indonesia's new anti-corruption regime – particularly the 2002 KPK Law, but also the 1999 Anti-Corruption Law. Indeed, the KPK Law was, from 2004–2007, challenged more times than any other statute in the Constitutional Court.[1] Most of these challenges were lodged by those successfully prosecuted by the KPK and convicted of corruption in the ACC.

It was hardly surprising that these laws were the subject of such intense challenge soon after the Constitutional Court's establishment. There was much to test: the legal infrastructures for the KPK and ACC were new and the powers granted to both institutions by the KPK and Anti-Corruption laws were extensive – even excessive, some critics argued. Many of those convicted for corruption could finance lengthy court proceedings. After exhausting their appeal rights through ACC panels, the Constitutional Court represented their final legal avenue.

What surprised some commentators, however, were the Constitutional Court's decisions in three of these cases. In one case, brought by corruption convict Dawud Djatmiko, the court was asked to examine a provision in the 1999 Anti-Corruption Law that authorised a court to convict defendants for corruption if

they merely breached undefined, even unwritten, moral and community standards, thereby causing loss to the state and benefiting themselves or another. This, the applicant argued, quite persuasively, breached the Constitution, which requires that there be 'legal certainty'. The court agreed and removed the impugned provision from the statute books. As I demonstrate in this chapter, however, the KPK and ACC have been able to avoid the intended effect of this decision. As several decisions from a Supreme Court ACC panel reveal, legal arguments have been invented to enable the courts to continue applying similar standards to those the Constitutional Court condemned. These arguments stand on shaky legal ground; fly in the face of the authority of the Constitutional Court; and have, I will show in this chapter, produced perverse, and manifestly unfair, outcomes in some corruption cases. They have added weight to concerns, discussed below, that the ACC compromised aspects of procedural fairness to maintain its flawless conviction rate. Although this has allowed Indonesia's anti-corruption drive to continue unheeded by the Constitutional Court decision, in this chapter I will show that doing so jeopardises Indonesia's already-weak 'rule of law'.

In a second case, brought by corruption convict Bram Mannoppo, the Constitutional Court declared that if the KPK had attempted to investigate an alleged crime that took place before the KPK itself was established, the KPK would breach the Constitution's prohibition on laws of retrospective operation. This statement sent shock waves through many anti-corruption supporters, who feared that it would preclude the KPK from ever pursuing the 'big' cases alleged to have occurred before the KPK's establishment in 2003. These cases include those involving President Soeharto and his family; and bankers who allegedly pilfered billions of rupiah of bailout funds intended to guarantee bank deposits in the aftermath of the 1997 economic crisis. There was, and still is, some controversy, however, about whether the Court's declaration, contained in the section of its decision entitled 'legal considerations' (*pertimbangan hukum*), is formally binding. Some scholars and commentators claim that only the court's final holdings (*amar putusan*) are binding. These are the bare statements at the end of the judgment in which the court declares whether the statute under review is constitutional and remains in force. Regardless of this controversy, however, the decision has had very little, if any, noticeable impact on the KPK's functions to date: the commission has certainly had no shortage of post-2003 corruption cases to investigate. The decision does, however, appear to represent a significant stumbling block if the KPK seeks, in the future, to investigate or reopen Soeharto-era corruption cases.

The third case, the *ACC* case, appears to have the most significant ramifications for the KPK and ACC. Again, the case was brought by a person the ACC had convicted for corruption. In its decision, the court declared that the ACC itself had not been established in line with the Constitution. The Constitution provides citizens with the right of equality before the law. According to the Constitutional Court, the establishment of the ACC breached this right because it was not the sole court with jurisdiction over corruption cases: general courts

continued to hear the corruption cases that the KPK decided not to pursue. The ACC thereby created a 'dual' system which, according to the Constitutional Court, undermined the constitutional principle of equality before the law.

The Constitutional Court did not order the ACC to be immediately shut down and its convictions undone, however. Instead, the Constitutional Court gave Indonesia's national parliament three years to pass a new statute on the ACC that remedied these constitutional defects and strengthened the legal foundation for the ACC. The Conclusion of this book shows that in the event, however, the legislature eventually enacted a statute that significantly weakens both institutions and will almost certainly obstruct successful prosecutions.

The court's siding with so-called corruptors in these cases was largely unexpected because of its reformist credentials and reputation. The decisions also seemed to contradict the sentiment of the Constitutional Court's earlier *KPKPN* case, discussed below, in which the court strongly supported the anti-corruption drive. Public and media reaction was highly critical, with some labeling the Constitutional Court the 'Court of Choice for Corruptors' (*Kompas* 2007b) and for providing a way for perpetrators to 'Fight Back' (*Koran Tempo* 2007).

This chapter aims to show, however, that even though these three cases seemed to favour so-called corruptors, the decisions hardly indicate that the court is pro-corruption or has sought to impede Indonesia's anti-corruption drive. The backlash against the court was led by media and legal observers who tended to assess the correctness or desirability of the Constitutional Court's decisions purely by their outcomes, rather than by an analysis of the correctness of the court's reasoning in light of the evidence and arguments presented (Butt and Lindsey 2010a).

In this chapter I will examine the reasoning and legal argument the court employed in these three cases. I aim to show that, though not without flaws, these decisions reveal that the Constitutional Court was acutely aware of the seriousness of Indonesia's corruption problem, but was also highly cognizant of the importance to the 'rule of law' of its own function – ensuring that parliament complies with the Constitution. These cases exhibit, I argue, the Constitutional Court's concern that the state's anti-corruption reforms have solid constitutional and legal foundations that allow for effective state action against corruption, without sacrificing the rule of law, particularly its planks of legal certainty, prospectivity and equality before the law. And, as I explain in this chapter, in so doing, the court deliberately avoided interfering with ongoing corruption investigations and prosecutions. Though the Constitutional Court may have been a site for attempted pushback against the KPK and ACC, corruptors have met only limited success there. Nevertheless, in some cases, the Constitutional Court has had little choice but to respond to the applicants' legitimate rule of law concerns.

I begin with the *KPKPN* case, in which the Constitutional Court appeared intent on elevating combating corruption to a constitutional issue of high order. I then turn to discuss the decisions outlined above for which the Constitutional Court has been accused of weakening Indonesia's legal infrastructure to combat corruption.

The KPKPN case

The first challenge the Constitutional Court heard to the KPK Law was brought by the KPKPN (*Komisi Pemeriksa Kekayaan Penyelenggara Negara*), the Public Officials' Asset Investigation Commission, and 32 of its employees.[2] Established in January 2001, the KPKPN's main function was to issue forms to public officials and ask them to declare their assets. Its budget was limited and it lacked power to take action if its requests were ignored or if its audits indicated corruption. But the KPKPN did effectively use the media to 'name and shame' officials and politicians who did not file declarations (Sherlock 2002: 376). As mentioned in Chapter 1, by June 2003, 59 per cent of executive branch had declared assets, as had 87 per cent of legislators, 84 per cent of the judges and 96 per cent of state-owned enterprise managers; and the KPKPN had identified likely corruption in the judiciary and the Attorney-General's Office (World Bank 2004a: 13).

One effect of the KPK Law disputed in this case was that it sought to subsume the previously independent KPKPN within the newly established KPK as part of the KPK's corruption-prevention division. Quite apart from their concerns about future employment, the applicants feared that the KPK might not be able to replicate the KPKPN's successes.

A Constitutional Court majority appeared to accept that the state had an obligation to eradicate, or at least sincerely to attempt to eradicate, corruption from public life. This obligation was, at least for some judges, derived from the Preamble to the Constitution, even though the Preamble does not mention corruption or its eradication. According to the majority:

> The peoples' aspirations … for protection for the nation and for social justice for all Indonesians, as is promised in the Preamble to the Constitution, demands the eradication of corruption and a state administration free of corruption, collusion and nepotism.
>
> (*KPKPN* case 2003: 117)

Incidentally, the majority held that the KPK Law did not infringe the Preamble, because the Law's purpose – establishing the KPK in particular – was in fact part of a government drive to eradicate corruption. And, the Constitutional Court held, how the government chose to eradicate corruption was a policy choice that the court lacked jurisdiction to review.

However, these findings appear to indicate that Constitutional Court judges might have invalidated the Law if it clearly had a deleterious effect on the 'fight against corruption' – that is, if its policies fell short of the government's obligations under the Preamble. An example of this might be if the Law had disbanded the KPKPN without setting up an equivalent or effective replacement.

Judge Soedarsono took an even stricter view of the government's obligation to eradicate corruption. He stated that he would have invalidated the Law. He appeared to interpret the Preamble as requiring the government to refrain from detracting from any successful advances it had made in its fight against corruption, although he did not explicitly say so. He concluded:

> I am of the opinion that the KPKPN was established to immediately eradicate corruption perpetuated by Indonesian state administrators.… It is unjustifiable to simply close down the KPKPN without explanation.
>
> (*KPKPN* case 2003: 125)

Judge Siahaan stated that:

> [t]he applicants have an interest … particularly considering the level of corruption that endangers the state … which is not on the decrease but rather is the highest in Asia (*Jakarta Post*, 3 March 2004). It is very relevant and strategic to view corruption as a threat to the constitutional rights and powers of all Indonesian institutions and people, who desire to defend and uphold the Constitution and the Unitary State of the Indonesian Republic.
>
> (*KPKPN* case 2003: 106–8)

The Bram Manoppo case[3]

The KPK had investigated Bram Monoppo over the improperly marked-up sale of a second-hand helicopter from Russia. Manoppo sought a review of Article 68 of the KPK Law, which, as discussed above in Chapter 1, allows the KPK to 'take over' preliminary enquiries (*penyelidikan*) and investigations (*penyidikan*) into, and prosecutions of, crimes of corruption which had not been completed before the KPK was established. Manoppo complained that the KPK had used the provision to investigate him for a crime allegedly committed before Article 68 itself was enacted – on 27 December 2002 – thereby breaching the Constitution's prohibition, in Article 28I(1), on laws of retrospective application.

The court held that Manoppo's constitutional rights had not been damaged by the operation of Article 68 because Article 68 had not been applied to him. The KPK had investigated him by itself. It had not 'taken over' his case from police or prosecutors.[4] The Constitutional Court denied Manoppo standing to bring his claim, because he was not able to prove that his constitutional rights had been breached by Article 68.

Nevertheless, in the course of reaching this decision, the court observed that the KPK Law itself could operate only prospectively and that, therefore, the KPK could pursue corruption committed only after the KPK Law was enacted – on 27 December 2002. If the KPK was to investigate or prosecute corruption alleged to have occurred before this date, then, the court opined, it would contravene the Constitution's prohibition on retrospectivity. As mentioned, anti-corruption campaigners feared that this statement meant that the KPK could not pursue significant pre-2002 cases, notably those that occurred during Soeharto's reign.

It seemed that such fears might be realised very quickly. While the Constitutional Court was deciding the *Manoppo* case, criminal proceedings were underway in Jakarta's first-instance ACC against Abdullah Puteh, former Governor of Nanggroe Aceh Darussalam (NAD). KPK prosecutors alleged that he was

involved with Manoppo in the improperly marked-up sale of a helicopter from Russia (*Hukumonline* 2004; *Hukumonline* 2005d). The day after the Constitutional Court handed down its decision in the *Manoppo* case, Puteh's lawyer, Mohammad Assegaf, argued in the ACC that Puteh should be released and that the KPK's investigation into his affairs should be invalidated. Noting that the crime for which Puteh had been indicted was allegedly committed before the KPK was established, Assegaf argued that the KPK's investigation and detention no longer had 'a legal basis' because they were 'a product' of an institution that lacked jurisdiction to do what it did (*Tempo* 2005). As evidence (*alat bukti*) of the KPK's lack of legal grounds, Assegaf adduced the Constitutional Court's *Manoppo* decision (*Koran Tempo* 2005). He argued that if Puteh's trial continued, the court would 'not be honouring the Constitutional Court's decision' (*Tempo* 2005).

Despite these arguments, the first-instance Jakarta ACC found Puteh guilty of corruption (*Hukumonline* 2005f; *Hukumonline* 2005e). However, the Jakarta court's decision was not unanimous. Chairperson Krena Menon and Judge Gusrizal – both career judges – appeared to accept Assegaf's views. They issued dissenting opinions in which they claimed that Puteh should have been released (*Hukumonline* 2005b). Citing the Constitutional Court's decision in the *Manoppo* case, the judges argued that due process required 'that one law cannot be set aside to apply another law' (*Hukumonline* 2005b). Ultimately, however, the Jakarta Anti-Corruption Appeal Court unanimously upheld Puteh's conviction.

Two weeks after the Puteh case, two career judges – Mansyurdin Chaniago and Sutiyono – issued dissenting opinions in another ACC case. The defendants in this case had also been investigated by the KPK for a crime allegedly committed before 27 December 2002. The dissenting opinions are said to have employed similar grounds to the dissents issued in the Puteh case (*Hukumonline* 2005c).[5]

In light of the Constitutional Court's decision in *Manoppo*, why weren't these corruption cases thrown out? If the KPK's investigation and prosecution were invalid, why were the defendants not immediately released? I proffer two explanations here.

First, there is legal debate about whether the court's declaration about retrospectivity in the Manoppo case is binding. As mentioned, the declaration was not included in the court's final holding (*amar putusan*) – the part of its decision in which it sets out whether it has decided to strike out the statute under review (*Hukumonline* 2005c; *Hukumonline* 2005b). Rather, the declaration was contained in its judicial reasoning (*pertimbangan hukum*). Even though statements in the court's judicial reasons might lead to or support its final holding, the precise legal weight of those reasons – and whether they bind other courts, the executive, or the legislature – is unclear and hotly debated.

To distinguish between two so closely interrelated sections of the same document seems highly artificial, however: if it is accepted that the Constitutional Court's holdings are binding, then it follows logically that the reasoning upon

which those holdings are based should also be binding (*Sinar Harapan* 2005; *Koran Tempo* 2005).

Yet even Constitutional Court judges have exhibited differing views. Soon after *Manoppo*, former Constitutional Court Chief Justice Asshiddiqie and Justice Palguna, for example, were reported in the Indonesian media as stating that the *pertimbangan hukum* of Constitutional Court decisions are not binding. Only the *amar putusan* is binding, they declared (*Hukumonline* 2005c; *Hukumonline* 2005b).[6] This would not, Asshiddiqie claimed, preclude other courts and officials from following the *pertimbangan hukum*; rather, it merely did not require them to do so. He said that a panel of judges 'could use [the Constitutional Court's decision in the *Manoppo* case] as a basis to overturn a case brought by the KPK before the KPK Law was created' (*Sinar Harapan* 2005). By contrast, former Constitutional Court Judge Roestandi, who sat on the panel which decided the Manoppo case, has argued that the *pertimbangan hukum* – and indeed the entire Constitutional Court decision – should be formally binding.

> The *amar putusan* is not a statement that comes out of nowhere; it is the product of the analysis of all facts and law adduced in the hearing. Therefore, the *pertimbangan hukum* constitutes an inseparable part of the decision, and can be relied upon by related parties and the community.
>
> (2006: 13)

Second, even if there were consensus that the Court's *pertimbangan hukum* is binding, the Constitutional Court's declaration in the Manoppo case would probably not have led to the release of defendants accused of committing crimes before the KPK came into existence. The court has, from its earliest case,[7] declared that its decisions operate only into the future (Butt 2009a). In other words, even if the court finds that a law is inconsistent with the Constitution, the law will be invalid only from the date the court hands down its decision invalidating the law. Anything done under the law before the Constitutional Court invalidated the law remains legal and does not need be to 'undone'.

This self-imposed limitation was brought into stark relief in the aftermath of a 2003 Constitutional Court case involving some of those involved in the Bali bombings in Kuta in 2002.[8] The court had, by a majority of five judges to four, decided that one of the laws under which the Bali bombers were investigated and, ultimately, convicted was unconstitutional because it was enacted after the bombings took place. The decision could not, however, be used to undo the action taken under the law that the court held was unconstitutional. In other words, the Bali bombers did not need to be set free or retried. Because they had been convicted under the law before the court had invalidated the law, their convictions stood (Butt and Hansell 2004).

Two further cases illustrate some of the ramifications of this limitation. In a 2007 case, three Australians convicted and sentenced to death for attempting to smuggle heroin out of Indonesia, amongst other applicants, asked the court to

consider whether imposing the death penalty in narcotics cases contradicted the Constitution's right to life.[9] In another, some of the Bali bombers approached the court, asking it to assess whether the way the death penalty is carried out in Indonesia – by firing squad – was cruel and inhumane punishment, prohibited by the Constitution.[10] The Court turned down both requests. Even if the court had agreed with the Australians and declared unconstitutional provisions allowing courts to impose the death penalty, the executions would probably have gone ahead because the death penalty had been imposed under the law before the Constitutional Court declared it unconstitutional. By contrast, if the Bali bombers had succeeded in their second case, they might have avoided the death penalty, at least by firing squad, because the law under which they were to be executed had not yet been applied to them – that is, they had not yet been executed.

Following this thinking, the Manoppo decision, if binding, would not have affected those who were being or had been investigated and prosecuted for corruption by the KPK for crimes allegedly committed before the KPK was established. The KPK Law had already been applied against them. Only those investigated or prosecuted by the KPK after the Constitutional Court handed down its decision in the Manoppo case might have been able to take advantage of the court's declaration.

Dawud Djatmiko case[11]

The constitutional challenge was brought by Dawud Djatmiko. He had been convicted of corruption in the first-instance Jakarta ACC, in the Jakarta ACC Appeal Court and also on appeal to the Supreme Court, for his role in the acquisition of land for a toll road project. He challenged the constitutionality of several provisions of the ACL[12] under which he had been investigated, prosecuted and convicted.

One of the provisions he disputed was the Elucidation to Article 2(1) of the Law. (An Elucidation (*Penjelasan*) is the explanatory memorandum that accompanies most Indonesian statutes and government regulations. It is not formally part of the law itself, but is often determinative in the interpretation of the law.) Article 2(1) prohibits any person, by means of an unlawful act, from enriching themselves or another, in a way that could damage state finances or the state economy. According to the Elucidation to Article 2(1), an act that does not breach written laws – such as statutes, government regulations and other types of laws – may nevertheless constitute an unlawful act. Such an act can, in the words of the Elucidation, merely fail to 'accord with the feeling of justice or social norms in the community'. In other words, by virtue of Article 2(1) and its Elucidation, prosecutors need only show, and judges need only accept, that the defendant acted in breach of community standards, which resulted in a benefit to a party (not necessarily the accused) and caused some financial loss to the state.

The Constitutional Court's decision

The Constitutional Court found that the Elucidation to Article 2(1) caused legal uncertainty, which is prohibited under the Constitution. It struck down the Elucidation to the extent that it referred to 'positive material unlawfulness', a concept discussed below, deciding that its use in criminal cases was unconstitutional for two main reasons.

First, the concept breached Article 28(D)(1) of the Constitution, which provides citizens the guarantee and protection of certain laws. This constitutional provision, the court stated, had been translated into the opening paragraph of Indonesia's Criminal Code (*Djatmiko*: 74). Under this provision, a person cannot be convicted of a crime except on the basis of pre-existing written criminal law (*perundang-undangan pidana yang telah ada*). The court rejected the establishment of criminal culpability on the basis of potentially previously undisclosed 'community' attitudes.

This is sound reasoning. Using previously unarticulated or undefined moral or community standards to dictate criminal culpability is tantamount to retrospectively applying a criminal law – prohibited by the Constitution, as mentioned above. Allowing prosecution and conviction on the basis of what might be vague, so-called community standards, rather than on the basis of written law, is fundamentally unfair because citizens might not be aware of those standards and, therefore, might unintentionally commit a crime. Of course, some might argue that because the standards forming the basis for the prosecution are 'community' standards, then the 'offender' will have due notice of them. But this is not a simple matter in Indonesia, with its diverse and numerous cultures and attitudes.

This leads to the court's second reason: that different communities might have different views on what constitutes appropriate, moral and just behavior, in effect making a particular act criminal in one part of Indonesia but not in another (*Djatmiko*: 74). Again, this argument appears to reflect rational decision-making. As is well known, Indonesia has great ethnic, linguistic, cultural and religious diversity. What is deemed acceptable in one place or among a particular group might not be so deemed in other places or among different groups.

Even identifying the precise content of a moral or community norm would be no easy task and would, it seems, make distortion of the norm possible. In this context, the concept might give free rein to police, prosecutors and judges to determine the substance of the community standard and, therefore, to determine what actions constitute a breach of the standard. In the hands of incompetent or unprofessional police, prosecutors or judges, such wide discretion might result in community standards being misidentified. It might also be misused to obtain easy convictions, as illustrated in case studies discussed below.

Many Indonesian lawyers presumed, quite logically, that this decision would make corruption more difficult to prove – which, in turn, would make the ACC's conviction rate impossible to sustain. These concerns have not, however, been borne out in practice. ACC panels have employed deliberate legal strategies – particularly, inventive statutory interpretation – to entirely avoid the effect of *Djatmiko*.

Unlawfulness

The ACC has been careful to re-establish the definition of unlawfulness in the Elucidation to Article 2(1). Explaining how the court has achieved this requires further examination of 'unlawfulness', mentioned in Article 2(1). The concept is employed in different ways in Indonesian laws, some of them discussed below. It has several translations, including 'unlawful act', 'wrongful act', and '[act] without legal right or authority' (Remmelink 2003: 187). It was, like many parts of Indonesian law, inherited from the Dutch upon Indonesia's independence in 1945.

The concept is well known within the Indonesian legal system and in many civil law countries. It is used as the legal basis for the adjudication of many types of non-criminal cases, including torts. In the non-criminal context, Article 1365 of Indonesia's Civil Code is the primary legal source of the concept. Article 1365 states that 'a person who causes loss to another person by means of an *unlawful act* [my emphasis] must, because of his or her fault in causing loss, compensate that loss'. The famous 1919 Dutch Supreme Court (*Hoge Raad*) case of *Cohen-Lindenbaum* is also pointed to in Dutch and Indonesian literature discussing 'material unlawfulness' in civil cases (see, for example, van Koppen 1990; de Vrey 2006).

In criminal cases, the concept has a number of uses (Hiariej 2006). The first is to refer to an act that satisfies all elements of a crime. This is often referred to as 'formal unlawfulness', or 'unlawfulness in the formal sense' (*perbuatan melawan hukum secara formil*).

The second use of this concept relates to the words '*secara melawan hukum*' (literally, 'in a way that breaks the law'), which are contained in some provisions of the Indonesian Criminal Code and other criminal laws. In these provisions, the concept itself constitutes an element (*unsur*) of the offence prohibited in that provision. According to Remmelink (2003: 186), the concept is used in this way to exclude from culpability perpetrators who had a lawful excuse – that is, a legal right or authority – to perform the act which, absent lawful right or authority, would have been a crime. For example, in Article 333 of the Criminal Code, which prohibits interfering with another's liberty, the inclusion of the words 'without lawful excuse' would prevent a police officer who legally arrests a suspect from being charged with false imprisonment.

A third use concerns 'material' or 'substantive' unlawfulness. To explain the difference between formal and material unlawfulness, Dutch and Indonesian scholars often refer to a famous 1933 Dutch Supreme Court (*Hoge Raad*) case in which a veterinarian was accused of breaching a statute forbidding intentional harm to cattle. The veterinarian had breached the law by ordering that cows be moved from meadows to a stable where other cattle had hoof and mouth disease. In defence of his actions, the veterinarian claimed that:

> from a veterinary point of view, it is better that cows stay dry and get infected with hoof and mouth disease, than that they give milk, in which

> case the disease spreads to the udders and causes other diseases. Dry standing cows can better get through hoof and mouth disease…
>
> (Elders and Woretshofer 1992: 220)

Despite deciding that the veterinarian had satisfied the elements of the crime, the Dutch court did not convict. Elders and Woretshofer (1992: 220) describe the court's decision:

> The Supreme Court recognize[d] … that there can be situations in which an act fits the words of a statute but should not be judged unlawful, because the statute is not really applicable. In other words, the action should not be seen as a criminal offence, although the words of the statute apply. We call that lawful excuse the absence of substantive unlawfulness. In this expression, 'substantive' ('*materieel*' in Dutch) is used as the opposite of 'formal'. 'Formal' unlawfulness [refers to actions that] fit the words of the statute.

The leading academic coverage of 'unlawful act' in Indonesian criminal law is provided by Komariah E. Sapardjaja (2002), a law professor and former Indonesian Supreme Court judge. She too distinguishes between formal and material unlawful acts: an unlawful act in the formal sense occurs when the alleged perpetrator's act meets all the criteria of a crime proscribed in a written law; it occurs in its material sense when the act meets the formal criteria of the crime *and* is inappropriate or reprehensible in light of community standards. In other words, material unlawfulness permits the court to consider mitigating circumstances not mentioned in the criminal law to excuse the defendant's formal breach of the law (Sapardjaja 2002: 25).

Sapardjaja explains that the 1933 veterinarian case was not followed in subsequent cases in Holland until the 1960s, when, according to Dutch scholar T. W. van Veen, some Dutch lower courts began applying the material unlawful act concept. Their decisions were, however, overturned by the *Hoge Raad*, which, despite its own 1933 decision, declared that applying the concept involved judges assuming a legislative function (Sapardjaja 2002: 26–7): it required judges to read into legislation mitigating or exculpatory circumstances that lawmakers would have included expressly if they had wanted judges to consider them. This Dutch aversion is consistent with the concern of judges in many other civil law countries to give primacy to legislation and to avoid engaging in blatant lawmaking or legal creativity (Lasser 2004; David and Brierley 1985; Dawson 1994).

Sapardjaja (2002: 183) shows, however, that Indonesian courts – including the Supreme Court – have eschewed the Dutch disfavour for the material unlawfulness concept and have in fact applied it in criminal cases. For example, the Indonesian Supreme Court employed the material unlawfulness concept to excuse breaches of written laws in embezzlement cases between the mid-1960s and the late 1970s.[13] Although the defendants had misappropriated funds, they were excused because they could show that they used the money in good faith for the

benefit of a company, an institution or employees, and not for personal benefit (Sapardjaja 2002: 152, 183). In one such case, the Supreme Court declared:

> An act can lose its unlawfulness not only by virtue of a statute, but also on the basis of the norms of justice or norms of unwritten law.… [I]n this case for example, the state was not disadvantaged, the general good was served and the defendant did not obtain any benefit.
>
> (Sapardjaja 2002: 137)

Sapardjaja (2002: 140, 191) cites as further examples a case in which the defendant bought a stolen motor cycle, but was excused after proving that he did not know it had been stolen;[14] and a case in which an official charged with receiving an honorarium was acquitted because, even though prohibited by law, accepting honoraria in similar circumstances had become a practice or custom accepted by the community.[15] These cases, Sapardjaja emphasises, employ the concept of material unlawfulness in a 'negative' way – that is, to negate culpability for a defendant who, strictly speaking, breaches the law.

Sapardjaja explains that the concept of material unlawfulness has been stretched further in Indonesia: it has also been employed in a 'positive' way. This manifestation of material unlawfulness sees a person being convicted for doing something that is reprehensible according to community standards even if that act did not constitute a crime under a statute or other law at the time it was committed (Sapardjaja 2002: 67, 210). In particular, material unlawfulness in the positive sense found its way into the 1971 ACL. Article 1(a) declared that 'whoever unlawfully (*dengan melawan hukum*) performs an act to enrich him/herself or another … which directly or indirectly damages the state's finances or economy…' has committed the crime of corruption. The General Elucidation to this law declared that '*melawan hukum*' includes both the formal and the material senses, so as to 'make it easier to prove the culpable act'.

Sapardjaja identifies the first instance of the 'positive' application of material unlawfulness in a 1983 Supreme Court case.[16] The director of Bank Bumi Daya had given credit to a customer for a real estate transaction. This contradicted written Indonesian central bank policy, which aimed to provide credit in sectors that would benefit larger numbers of people. The Supreme Court found that the defendant had extended the credit to secure benefits for himself (Sapardjaja 2002: 197–8). The defendant had, however, breached no criminal laws by providing this credit. He had breached only these central bank policy guidelines, which merely provided administrative penalties, issued by the central bank, for non-compliance. The Supreme Court, however, brought his acts within the 1971 ACL in two ways: first, by holding that, because his act breached Indonesian central bank policy, he lacked lawful authority to provide the credit, thereby making his act 'unlawful'; second, by declaring that

> corruption is a materially unlawful act because it is inappropriate, reprehensible and offends the majority of the community, using general principles of law according to appropriateness in the community as a yardstick.

The 1999 ACL employs formal and material unlawfulness within its general definition of corruption in Article 2(1) but, unlike the 1971 law, declares explicitly, in the Elucidation to Article 2(1), that positive material unlawfulness falls within its ambit. It was precisely this 'positive' material unlawfulness concept – contained and endorsed in Article 2(1) of the 1999 ACL and its Elucidation – to which Djatmiko objected.

Circumvention or direct contravention: the response of Supreme Court ACC panels

As mentioned, the immediate presumption in Indonesian legal circles was that the Constitutional Court's ruling would make securing convictions in corruption cases more difficult. To bring a defendant's alleged misdeed within the ambit of Article 2(1) of the ACL, prosecutors would now need to prove that the defendant breached a written law.

However, this concern has not borne out in practice, as I will show by examining five Supreme Court cases decided immediately after *Djatmiko*. I have chosen to discuss these five cases in particular – all appeals from Jakarta's ACC – for two reasons. First, in all five cases the defendant was charged with procuring goods or services on behalf of the government through the direct appointment (*penunjukan langsung*) of providers, in return for some form of kickback from the providers. In all cases, reference was made to Presidential Decree No 80 of 2003 on Guidelines for the Procurement of Government Goods and Services (the '2003 Presidential Decree'). The Decree suggests that procurement should, as a general principle, be by public tender, although, in 'special' or 'particular' circumstances, appointing one service provider might be permissible. Defendants in these cases were found to have breached Article 2(1) of the 1999 ACL, having engaged in both formal unlawfulness by breaching the 2003 Presidential Decree, and positive material unlawfulness by breaching community standards of appropriateness. The second reason for choosing these cases is that, in its decisions, the Supreme Court referred specifically to *Djatmiko*, but explicitly circumvented, if not disregarded, the Constitutional Court's decision.

After briefly describing the facts of each case and the penalties imposed by the first instance and appeal courts, I describe how the Supreme Court addressed *Djatmiko* in all five cases. I then return to discuss the *Rusadi Kantaprawira* case in more detail because it highlights the Constitutional Court's concerns about positive material unlawfulness.

Three of these five cases involved former members of the Indonesian Electoral Commission (the KPU, or *Komisi Pemilihan Umum*), indicted for corruption in the procurement of goods and services required for the 2004 national and local elections. The KPU had been thrust into the spotlight after one of its members, Mulyana W. Kusumah, was caught red-handed attempting to bribe a State Audit Board (*Badan Pemeriksa Keuangan*, or BPK) employee, allegedly to ensure the 'cover-up' of irregularities in the KPU's procurement processes (*Jakarta Post* 2005a; *Jakarta Post* 2005b). A full-blown BPK audit of the KPU's

activities ensued. The KPK then used evidence from the audit to successfully prosecute KPU members.

The first case involved Nazaruddin Sjamsuddin, formerly head of the KPU and Professor of Social and Political Studies at the University of Indonesia. He was convicted for accepting US$566,000 in kickbacks from an insurance company he appointed, apparently in breach of the 2003 Presidential Decree, to provide accident insurance for people working on the elections (*Jakarta Post* 2005c; *Hukumonline* 2005h). At first instance and on appeal, the Jakarta ACCs sentenced him to seven years' imprisonment, fined him Rp300 million, and ordered him to repay approximately Rp5 billion. His imprisonment term and repayment amount were reduced on appeal to the Supreme Court.[17] The Supreme Court held that the lower courts had failed to consider mitigating circumstances, such as the success of the election; that the money was used to 'facilitate' the election and for the 'welfare' of other KPU members; and that the defendant lacked the management experience to run the KPU (*Syamsuddin*: 181).

The second case involved Rusadi Kantaprawira, a Professor of Politics at Padjajaran University, who was head of a KPU committee entrusted with ensuring the supply of approximately 1.2 million bottles of ink for use in the elections (*Jakarta Post* 2005d; *Tempo* 2006). Ink of strong indelibility is used in Indonesia to stain the fingers of people who have already voted, to prevent them from voting more than once. The KPK prosecuted Kantaprawira for appointing the ink producers and importers in breach of the 2003 Presidential Decree. The first-instance Jakarta ACC found him guilty of corruption.[18] He received a four-year prison term and a fine of Rp200 million, and was ordered to repay Rp1.38 billion to the state.[19] The Jakarta ACC Appeal Court and the Supreme Court upheld his imprisonment and fine, but overturned the lower court's order to repay the money to the state, for reasons discussed below.[20] Achmad Rojadi, the defendant in the third case, was secretary of the ink procurement committee. He was convicted on grounds similar to those used in the *Kantaprawira* case and received the same criminal punishments (*Hukumonline* 2006c).[21]

The fourth and fifth cases also involved breaches of the 2003 Presidential Decree, but not KPU members, and were also appealed all the way to the Supreme Court. The defendant in the fourth case was Theo Toemion, a former parliamentarian and head of the Investment Coordination Board (*Badan Koordinasi Penanaman Modal*). He was convicted of corruption for appointing a company he owned to run projects associated with Indonesian Investment Year 2003–2004. He received a six-year prison term and a Rp300 million fine, and was required to repay Rp23 billion to the state (*Kompas* 2005; *Hukumonline* 2006d; *Detikcom* 2005).[22] The defendant in the fifth case, Tirta Winata, was found guilty of conspiring with officials from the fisheries ministry to obtain a contract for the procurement of laboratory equipment, through a rigged tender process, in return for kickbacks (*Jakarta Post* 2006). He received a six-year prison sentence and a fine of Rp500 million, and was required to repay Rp2.3 billion (*Winata* case: 86).[23]

In all five cases, the Supreme Court dealt similarly with the issue of material unlawfulness. Indeed, many passages in the cases seem to have been 'cut and pasted' from a common source, or from each other. In *Toemion* (178), *Winata* (82) and *Rojadi* (94), the court began its treatment of 'positive material unlawfulness' with the following statement:

> …it is not excessive for the Supreme Court to put forward its opinion about the meaning of 'unlawful act' as referred to in Article 2(1) of Law 31/1999, after the issuance of Constitutional Court Decision 003/PUU-IV/2006 of 25 July 2006, which declared the Elucidation to Article 2(1) of Law 20/2001 and Law 31/1999 'to conflict with the 1945 Constitution and no longer to have legal binding force'. In this case, the MA [Mahkamah Agung, Supreme Court] will continue to give meaning to '*unlawful act*' as referred to in Article 2(1) of Law 31/1999, both in its formal and material senses…

In *Sjamsuddin* (175) and *Kantaprawira* (116), the court began with a similar passage:

> The [lower courts] did not erroneously apply the law … [T]he MA agrees with [the lower courts] continuing to interpret 'unlawful act' within the meaning of Article 2(1) of Law 31/1999, in both its formal and material senses, even though in its Decision of 25 July 2006, No. 003/PUU-IV/2006, the Constitutional Court declared that the Elucidation to Article 2(1) of … Law 31/1999 conflicts with the 1945 Constitution and no longer has binding legal force.

In all five decisions, the Supreme Court then set out the reasons for this stance, using identical wording, save for several minor editorial differences (*Kantaprawira*: 116–17; *Winata*: 82–3; *Rojadi*: 94–5; *Toemion*: 178–9; *Sjamsuddin*: 176). For brevity, these reasons will be summarised rather than extracted. The Supreme Court declared that the Constitutional Court, by invalidating the Elucidation to Article 2(1), had made unclear the meaning of 'unlawful act' in the text of Article 2(1) itself. The resulting uncertainty, according to the Supreme Court, required it to engage in 'discovery of the law' (*penemuan hukum*) to clarify the meaning of 'unlawful act'. The court pointed to Article 28(1) of Law 4 of 2004 on the Judiciary, which requires judges to 'discover, follow and understand the legal values and sense of justice alive in the community'. It pointed also to Article 16(1) of the same law, which declares that judges 'must not refuse to hear and adjudicate a case brought before them on the basis that the law does not exist or is unclear; rather, they must hear and adjudicate it'.[24] In light of these two Articles, the Court declared, when considering whether an act was 'unlawful', judges should 'determine the wishes of the public at the time the provision was applied to a concrete case'. In support of this finding, the Supreme Court pointed to the work of two Dutch scholars who argued that judges should base their decisions on 'legal awareness', 'legal needs' and the law as it is applied in the society in which their decisions are handed down.[25]

In *Toemion*: 179; *Kantaprawira*: 117; *Winata*: 83; and *Rojadi*: 95, the Supreme Court then observed that statutes are often imperfect and unclear, but that judges were required to 'provide justice' by interpreting those statutes, including 'grammatically and historically'.[26] In the *Toemion* case (179) only, the court also emphasised that, when interpreting statutes, it would apply Gustav Radbruch's doctrine of priorities, under which the interests of legal certainty are considered subservient to 'justice and the benefit of the law'.[27]

Having declared that the Constitutional Court's invalidation of the Elucidation to Article 2(1) had left the meaning of the term 'unlawful act' in Article 2(1) unclear, and having established that the Supreme Court has authority to interpret statutes actively and even to create law to resolve such uncertainties, it attempted to fill the gap identified. In this endeavour, the court relied upon two sources of law. The first source was doctrine (*doktrin*) – that is, the work of legal scholars, both Dutch and Indonesian; the second was Supreme Court jurisprudence (*yurisprudensi*) – that is, Supreme Court decisions.[28] In all five cases, the Supreme Court declared that both of these sources of law provided that:

> 'unlawful' for crimes of corruption means *unlawful in the formal and material senses* … '[U]nlawful acts' in the material sense includes its positive and negative senses.

The court was very concerned to emphasise that 'material unlawfulness' described an act which, according to community values, was reprehensible, repeating the point in consecutive paragraphs in all five cases (*Toemion*: 180; *Winata*: 84; *Rojadi*: 96; *Kantaprawira*: 118; *Sjamsuddin*: 177). An act could, therefore, be unlawful and fall within the definition of the ACL even if it was not unlawful in a formal sense – that is, even if the act did not breach any written laws. This, the Court noted in all but *Winata*, made it easier to prove corruption, and hence to secure convictions at trial, citing the work of Indonesian criminal law scholar, Dr Indiryanto Seno Adji (2001).

In all cases except *Winata* the court reaffirmed this interpretation of 'unlawfulness' by pointing to a Minister of Justice Letter of 11 July 1970. The Court accepted that this was a precursor to the tabling of the 1971 Corruption Eradication Draft Law for parliamentary approval. Point (2) of the Letter, as quoted by the court, states:

> so to cover acts which are truly corrupt, but are difficult to prosecute because they were not preceded by a crime or infringement, this Bill employs 'unlawfulness' in the formulation of the crime of corruption, which includes [within its ambit] acts which conflict with general norms or with the need in communal life to be caring towards other people, their property and their rights.
>
> (*Rojadi*: 96–7; *Kantaprawira*: 118; *Toemion*: 180; *Sjamsuddin*: 177)

All cases then cited the example of Supreme Court Decision 275K/Pid/1983 of 28 December 1983, mentioned above, in which a Director of Bank Bumi Daya

was found guilty of corruption, despite breaching only central bank guidelines, because his act was objectionable by reference to community norms.

In all five cases, the court concluded its discussion of 'unlawfulness' with the following statement:

> Jurisprudence and doctrine are sources of formal law in addition to statutes, custom and treaties, and are appropriately used by the Supreme Court in the concrete cases that come before it. Jurisprudence concerning the meaning of 'unlawful act' in a *formil* and *materiil* sense must continue to be used as a guide so as to achieve consistency … in cases of corruption, because this accords with the legal awareness and legal feelings alive in the community, the legal needs of citizens, and the legal values and the feelings of justice alive within the community.
>
> (*Winata*: 84; *Rojadi*: 97; *Kantaprawira*: 119; *Toemion*: 180–1; *Sjamsuddin*: 178)

It is clear, then, that the Supreme Court has filled a perceived legal lacuna – left by the Constitutional Court's deletion of the definition of 'unlawfulness' from the Elucidation to Article 2(1) of the ACL – with the interpretation of 'unlawfulness' adopted in its own previous decisions and in the works of selected legal scholars. This interpretation is identical to that which the Constitutional Court struck down through fear of legal uncertainty and injustice.

Critiques

Several strong legal arguments can be made against the Supreme Court's decisions in these five cases. The first relates to flaws in methods of statutory interpretation. Judges are not required to engage in *penemuan hukum* unless a statute is unclear or incomplete. The effect of *Djatmiko* is that in order to be convicted of corruption, defendants must have broken a written law. There appears to be no lack of clarity or completeness in this. There was, therefore, no justification for the Supreme Court to disturb the effect of the Constitutional Court decision.

The second is a related constitutional argument. In these five decisions, the Supreme Court appears to have breached the law and exceeded the jurisdiction granted to it under the Constitution. The Constitution has appointed the Constitutional Court, not the Supreme Court, to determine whether legislation is constitutional. The Constitution stipulates that Constitutional Court decisions are 'final and binding' (Article 24C), and there is nothing to suggest that they do not also bind the Supreme Court. It is the Constitutional Court alone that has the 'last say' on whether a statue, or part of a statute, should remain on the books. By circumventing *Djatmiko*, the Supreme Court, then, appears to have breached Article 1(3) of the Constitution, which requires that Indonesia be a 'state based on law' (*negara hukum*). These Supreme Court cases also expose a flaw in Indonesia's constitutional order: constitutional defects contained in Supreme Court decisions are not remediable.

A third criticism is that 'unlawfulness' within the meaning of Article 2(1) of the ACL should not encompass breach of mere guidelines for procurement, albeit written; rather, it should it require breach of a formal *law*. To my knowledge, this criticism has not been voiced by the Constitutional or the Supreme courts, nor by media or legal commentators. (It was, however, raised by Rantaprawira's lawyer, Hotman Paris Hutapea (*Detiknet* 2006)). The criticism does, however, seem to correspond with the Constitutional Court's concern in the *Djatmiko* case to ensure that culpability be limited by reference to clear pre-existing norms rather than vague community standards. Is a guideline or policy, with no sanctions applicable – or intended – for breach, really a law? And is its breach, therefore, really an 'unlawful' act? How does one distinguish between a rule the breach of which is not 'unlawful' and a rule the breach of which is 'unlawful'? Could a person who breaches traffic rules and damages a car owned by the state, for example, stand accused of corruption? Could breach of a school rule by a student ground a corruption conviction? Surely, acts that attract serious penalties – including imprisonment and even death, as do acts of corruption under the 1999 ACL – must be specifically defined, in some detail, by statute, after substantial open parliamentary debate. If parliament wanted a breach of procurement guidelines to constitute a criminal act, then why has it not made such breach an offence under the Criminal Code or Anti-Corruption Law?

Before moving on to the Constitutional Court's decision in the *ACC* case, I will discuss the decision of the ACC panel of the Supreme Court in *Kantaprawira* in more detail as a case study. The decision brings the Constitutional Court's concerns about positive material unlawfulness into sharp relief. It is also a case-in-point for critics who claim that the KPK's 'hyperactivity' has made government officials afraid to perform their functions – particularly in procurement of goods and services – fearing that they will inadvertently breach a rule of procedure, or make a mistake, which causes financial loss to the state, thereby resulting in a KPK investigation (Hotland and Taufiqurrahman 2008).

The Constitutional Court's fears realised? The Rusadi Kantaprawira case

Kantaprawira was convicted for appointing suppliers – four foreign and three domestic – to provide ink for the 2004 elections. At trial, prosecutors argued that he had twice breached the 2003 Presidential Decree. First, by directly appointing seven companies to supply the ink he had breached Article 17(5) of the Decree, which permits direct appointment absent a public tendering process only in 'emergency situations'. (In emergency situations, however, the Decree permits the appointment of only one provider (*Jakarta Post* 2005d; *Hukumonline* 2006a).) Second, according to prosecutors, by setting the price the state would pay for the ink at the average quote of the seven tenders, he had breached Article 13(1) of the Decree, which required him to set the price using 'expertise and reliable data' (*Jakarta Post* 2005d).

Prosecutors argued, and the court accepted, that Kantaprawira's decision to apply the average price implicit in the offshore tenderers' bids, rather than the price of the lowest offshore supplier's bid, resulted in imported ink costing Rp33.2 billion rather than Rp32.3 billion, causing a loss to the state of Rp0.9 billion (*Tempo* 2006; *Hukumonline* 2006c). Similarly, applying the average, rather than the lowest bid price for ink from domestic suppliers added Rp0.5 billion. According to this assessment, applying average rather than lowest bid prices caused a total loss to the state of around Rp1.4 billion (*Kantaprawira*: 19–20), the amount the state would have saved had the lowest tenders for local and imported ink been accepted.

Safeguarding the elections

Hotman Paris Hutapea, head of Kantaprawira's legal team,[29] objected to his client's conviction on several grounds. One was that Kantaprawira did not breach a criminal law – he breached only the 2003 Presidential Decree, which is a law of an administrative nature. Convicting and sentencing him on the basis of this Decree was, therefore, itself a contravention of Article 1(1) of the Criminal Code, which states that defendants can only be convicted of a criminal offence under a written criminal law (*perundang-undangan pidana*) (*Detiknet* 2006).

Hutapea's second objection was that, as its title suggested, Presidential Decree 80 of 2003 on Guidelines for the Procurement of Government Goods and Services contains only suggested procedures for procurement and tender. It contains no criminal sanctions for non-compliance (*Kantaprawira*: 59). Breach of these non-binding guidelines should not, therefore, have resulted in criminal proceedings and imprisonment. In short, the guidelines are not 'law', so breaching them should not constitute 'unlawfulness' or an 'unlawful act'.

The third objection was that, far from being reprehensible and abhorrent by community standards, the means adopted by Kantaprawira and his committees were entirely reasonable under trying circumstances. The end – successful elections – was critically important for the nation and justified those means. As Kantaprawira himself neatly summarised at trial, he had the difficult task of balancing action, policy and rationality with time restrictions (*Gatra* 2006). After announcing the ink supply tender, the committee he chaired received several dozen applications. Most of them failed the formal pre-qualification process under the 2003 Presidential Decree (KPPU 2005). The capacity of any of the remaining tenderers to supply and deliver all of the ink on the necessary scale within the required time-frame was highly questionable (*Kantaprawira*: 51, 64). Some tenderers had no relevant experience; others were of dubious financial viability (*Jakarta Post* 2004b; *Jakarta Post* 2004c). Kantaprawira was also said to have been concerned that the quotations provided by some of the seven tenderers were too high (*Jakarta Post* 2005d).

Kantaprawira considered re-tendering for the supply of the ink but, with the 'strong support' of members of Indonesia's national parliament whom he approached for advice, he decided against this (*Jakarta Post* 2004c). The KPU

had begun preparing for the elections much later than expected because of delays in the national legislature enacting a new electoral law (*Kantaprawira*: 43). By the time the DPR had passed this law, the election was only a matter of weeks away. Because ink was critical to the success of the election, Kantaprawira decided to appoint seven tenderers to supply it. He arranged for three Indonesian companies to supply around 100,000 bottles of ink and for four other companies to import 1.14 million bottles from India. Kantaprawira claimed to have divided responsibility to supply the ink among several tenderers because relying solely on one supplier or importer carried too much risk that the ink would not be supplied in sufficient amounts to all necessary locations, or even at all (*Kantaprawira*: 43–4, 60).

Kantaprawira's concern over capacity and financial viability should be seen in the context of problems the KPU had experienced in securing the supply of other election necessities. The KPU had difficulties with ballot box supply, for example, because the sole tender winner, PT Survindo Indah Prestasi, failed to meet its production target. The KPU shaved 60 per cent off its contract with PT Survindo and awarded contracts totalling this amount to the second and third-place bidders (*Jakarta Post* 2004a; *Jakarta Post* 2004b). In this context, it would seem that Kantaprawira's concern to mitigate risk by using seven ink suppliers was entirely justifiable.

It is arguable also that the price Kantaprawira set for the ink was reasonable under the circumstances. As mentioned, he set the price for the ink based on the 'average price quotations offered by the companies' (*Jakarta Post* 2005d). A higher allocation had been 'pre-approved' by a plenary meeting of the KPU and he was said to have spent less on ink than was spent for the 1999 elections (*Kantaprawira*: 55). His decision to use the average quote was also subsequently ratified by the KPU (*Hukumonline* 2006b).

One further mitigating factor is of critical importance: although prosecutors alleged that Kantaprawira accepted kickbacks from the tenderers, this was not proven at trial. Indeed, the first-instance ACC accepted that he did not enjoy any of the proceeds of any losses suffered by the state. On appeal, the Jakarta ACC Appeal Court upheld his term of imprisonment and fine, but declared that he need not repay the Rp1.3 billion because he did not receive any of it (*Kantaprawira*: 45). Further, Kantaprawira's lawyers observed that the profits obtained by the various ink suppliers were 10–15 per cent, which, they argued, fell well within the limits of propriety (*Kantaprawira*: 46). Nevertheless, the absence of any benefit flowing to Kantaprawira did not affect the determination of his ultimate culpability. As discussed, Article 2(1) of the ACL does not require that the act causing loss to the state benefit the perpetrator; the act can benefit a third party – in this case, the ink suppliers – and still constitute corruption.

These are strong arguments against Rusadi's culpability and, ultimately, his conviction. Indeed, it is arguable that – as his lawyers asserted (*Kantaprawira*: 66) – considering the success of the 2004 elections in the face of these significant obstacles, the Supreme Court should more properly have employed the concept of material unlawfulness in its *negative* sense. That is, even assuming

that it was proper (which, this chapter has argued, it was not) for Kantaprawira to be convicted for corruption purely because he breached the 2003 Presidential Decree, the Supreme Court could have held that his breaches were not, in fact, culpable, in a similar manner to the arguments in the 1933 *Hoge Raad* veterinarian case mentioned above. Instead, however, the Supreme Court focused on his so-called 'formal unlawfulness' – his breach of non-binding procurement guidelines – and the 'reprehensibility' of not choosing one provider or the lowest quote or both, even though if he had done so, sufficient ink almost certainly would not have been supplied in time for the election. The court attributed to him criminal culpability for work that appeared to be performed in good faith in the interests of building Indonesia's democratic traditions, by ensuring successful delivery of essential electoral supplies.

The ACC case

Unlike *Manoppo* and *Djatmiko*, the Constitutional Court's decision in the *ACC* case has had far-reaching implications for the KPK and ACC, explored in greater depth in the Conclusion of this book. Again, this case was brought by defendants in ACC cases. Some of them were former members of the KPU, including Nazaruddin Syamsuddin and Rusadi Kantaprawira.

The bulk of the KPK Law is devoted to establishing the KPK and its procedures, but several of its latter provisions briefly cover the ACC. The applicants argued that Article 53 of the KPK Law, which established the ACC, was unconstitutional on two main grounds.

First, the applicants pointed to Article 24A(5) of the Constitution, which states:

> The organisation, position, personnel and procedural law of the Supreme Court and the judicial bodies below it [including the ACC] are regulated by (*dengan*) statute [my emphasis].

The applicants contended that, because Article 24A(5) did not use the phrase 'in (*dalam*) a statute', but rather used the term 'by (*dengan*) statute', the ACC needed to be established not only by statute, but in its own *separate* statute. According to this argument, the ACC could not be established in a statute which was primarily concerned with the establishment of the KPK. The Court disagreed, by a majority of eight to one (with Marzuki dissenting).

A second argument, which the Constitutional Court accepted, was that having two courts, both with jurisdiction in corruption cases, created 'dualism'.[30] Article 53 added the ACC to the existing system to hear corruption cases, rather than displacing it. The result was that ordinary police, prosecutors and courts deal with the corruption cases that the KPK decides not to pursue.

In this context, the Constitutional Court accepted that Article 53 had created 'double standards' which had in fact led to very different decisions in similar cases depending on the court in which the cases were heard. The Court cited as

key differences the KPK's lack of power to issue SP3s and the use of ad hoc judges in the ACC. According to the Constitutional Court, this breached the Constitution's right to equality before the law. The Constitutional Court clearly thought that all corruption cases should proceed through the ACC rather than through the general courts (*ACC* case: 288).

The Constitutional Court's decision

Despite finding that the ACC's establishment was unconstitutional, the Constitutional Court refused to strike down the legislative basis for the ACC with immediate effect. This may well have required the disbanding of the ACC. Instead, citing the need for 'judicial wisdom and craftsmanship' (*ACC* case: 289), the Constitutional Court decided to allow the ACC to continue operating for three years, giving the Indonesian parliament time to enact a new statute granting the ACC exclusive jurisdiction over all corruption cases. The deadline for enactment was set at 19 December 2009 (*ACC* case: 289). If this date passed without legislative response, the legal basis for the ACC would disappear and it would be required to shut its doors.

The Constitutional Court explained that it was concerned to 'restrict the legal consequences arising from a declaration of unconstitutionality of a statute' in the 'greater public interest' (*ACC* case: 288). The court feared that striking down Article 53 immediately would disrupt ACC trials and cause legal chaos. It emphasised the disastrous effects corruption had brought upon the nation and wanted to allay concerns that it was weakening efforts to eradicate corruption.

> The court views corruption, which has damaged the social and economic rights of the Indonesian community, as an extraordinary crime and a common enemy of the community and nation as a whole. Therefore, the human rights sought to be upheld through this review are small-scale in comparison to the protection of the economic and social rights of the majority of the community damaged by corruption. Corruption has weakened the ability of the state to provide good public services and has impeded the effective functioning of the state. This has become a weighty economic burden because it has created high macroeconomic risk which has endangered financial stability, public security, the law and order. Moreover, it can undermine the legitimacy and credibility of the state in the eyes of the people.
>
> (*ACC* case: 287)

The court accepted that parliament could not enact a new statue overnight, hence the grace period (*ACC* case: 286–87).

Corruption and the rule of law

This chapter has demonstrated that, when reviewing Indonesia's anti-corruption regime, the Constitutional Court has trodden a fine line between upholding the

rule of law on the one hand, and supporting Indonesia's anti-corruption efforts on the other. Doing so has required concessions and produced side effects. On the one hand, to maintain the rule of law – by ensuring equality before the law in the *ACC* case and legal certainty in the *Djatmiko* case – the Court hindered the work of the KPK and the ACC. The extent of the hindrance has differed as between cases. The *Djatmiko* case presented only temporary problems – problems that inventive, if unconvincing, and probably illegal statutory interpretation easily overcame. The *ACC* case has, to date, proven the most significant stumbling block of them all. But blame for the DPR's particular legislative response to the Constitutional Court's decision cannot be brought home to the court itself. The court had no control over the way the legislature would remedy the constitutional defect the court identified.

On the other hand, ostensibly to support the anti-corruption movement, and recognising Indonesia's rampant corruption and its deleterious effects, the Constitutional Court has been willing to compromise, apparently to the detriment of the rule of law. In the *ACC* case, it gave parliament a three-year grace period to provide a new, constitutional, legislative basis for the ACC. Yet the Constitution requires the court to ensure that the national parliament follows the Constitution. When the parliament fails to do so and the court chooses not to intervene, then the court seems to be failing to perform this task. The Court has allowed a law to continue in force which, the court itself has determined, is beyond the parliament's lawmaking power. On one view, then, the court, charged with enforcing the Constitution, has itself breached it. This would appear to leave the *negara hukum* (Indonesia's version of the rule of law) – which requires, at a minimum, that the government abide by the law, particularly the Constitution – teetering on the brink of irrelevance. Another side effect of the compromise is that the Constitutional Court has, by requiring parliament to enact a new ACCL, equipped parliament with a weapon with which it could, and did, weaken the KPK and ACC, as is explained in the Conclusion of this book.

As for the *Djatmiko* case, to the knowledge of the author, the Constitutional Court has not attempted to prevent ACC panels, including within the Supreme Court, deliberately evading its decision. Admittedly, the Constitutional Court has very few tools at its disposal to force compliance. It has not, however, to my knowledge, even attempted to publicly rebuke – at press conferences for example – ACC panels for continuing to convict unconstitutionally. Perhaps such an effort would have been in vain in any event, given that observable public and media sentiment supports the efforts of the KPK and the ACC.

Encountering virtually no resistance, ACC panels have continued convicting on the basis of purported breach of vague community standards. This is unfortunate, because the Constitutional Court's legal reasoning in the *Djatmiko* case was sound and its concerns about the existence of material unlawfulness within a rule-of-law state were well founded, as this chapter has shown. Perhaps no other case bears out the Court's concerns more clearly than the *Kantaprawira* case.

4 The Antasari trial

> 'Like mountain water running down in broad daylight, everything is crystal clear'.
>
> Cirus Sinaga, Head of the team of prosecutors (Baskoro and Sutarto 2010)

> 'There's a director. Nasruddin was the lead actor and Rhani was the supporting actress'.
>
> Antasari's lawyer, Juniver Girsang (Handayani and Aprianto 2009)

Overview

On 14 March 2009, Nasruddin Zulkarnaen, a prominent Jakarta businessman, was shot twice in the head while on his way home from a game of golf. He died in hospital the following day. After a two-day investigation, police named then-serving KPK Chairperson, Antasari Azhar, a formal suspect in the case and detained him. Police alleged that Antasari had been involved with Nasruddin's third wife, Rhani Juliani. After discovering the encounters, Nasruddin reportedly began blackmailing Antasari, threatening to publicly reveal the affair. In response, police claimed, Antasari ordered Nasruddin's assassination.

Antasari's trial began on 8 October 2009 in South Jakarta District Court. Prosecutors accused him of ordering Nasruddin's premeditated murder – a breach of Articles 55(1), 55(2) and 340 of the Criminal Code (*Kitab Undang-undang Hukum Pidana* or KUHP). Article 340 of the Indonesian Criminal Code reads, in my translation, as follows:

> Whoever deliberately and with prior planning takes the life (*merampas nyawa*) of another person faces, for premeditated murder: a death sentence, life imprisonment or a maximum 20 years in jail.

Article 55 makes those who commit specified inchoate offences primary 'perpetrators' and subject to the same penalties as perpetrators. Article 55(1)(1) makes those who order or participate in a criminal act punishable as if they performed the act themselves. Article 55(1)(2) classifies as perpetrators those who persuade or incite another person to perform a criminal act: by giving or promising

something or misusing their authority or influence; through violence, threats or deception; or by providing opportunity, means or information.

Antasari's four-month trial attracted significant public and media attention in Indonesia. Clearly, Indonesia's Prosecution Service (*Kejaksaan*) considered this case important: it sought the death penalty, allocated 27 prosecutors to the case and called 49 witnesses (Baskoro and Kustiani 2009). Antasari's team, comprising around 40 lawyers, apparently including some former prosecutors (Baskoro and Sutarto 2010), put up a spirited defence, to no avail. On 11 February 2010, Antasari was found guilty and sentenced to 18 years in prison.[1] He lost appeals to Jakarta's High Court and the Supreme Court, which upheld, in all material respects, the South Jakarta court's decision (*Tempo English Edition* 2010d; *Hukumonline* 2010o).

Prior to Antasari's trial, several others had already been convicted for involvement in the plot. Daniel Daen Sabon, the assassin, received 18 years' imprisonment (Baskoro and Kustiani 2009; Baskoro and Sutarto 2010). Fransiskus, who drove the car used to block Nasruddin's car as it navigated a speed hump, and Heri Santosa, who drove the motorcycle from which Daniel shot Nasruddin, both received 17 years. Eduardus Noe Ndopo Mbete and Hendrikus Kia Walen were found guilty of recruiting Fransiskus, Heri and Daniel. They, too, received 17 years. Williardi Wizar, former South Jakarta police chief, was sentenced to 12 years for helping recruit the hitmen; Sigid Haryo Wibisono, media magnate, and chairperson of the *Merdeka* daily newspaper to 15 years for helping plan and finance the murder; and Jerry Hermawan Lo to five years for introducing Williardi to Eduardus.

The case

When Antasari was first arrested, public support for him was hardly univocal. He had been appointed in December 2007 as KPK chairperson with backing from the Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia – Perjuangan*, or PDI-P) and Golkar (Handayani, Kustiani and Nilawaty 2009). These are the two largest parliamentary factions and some of their members were accused of impropriety, including money politics, during the selection process. His appointment was an ominous sign for some anti-corruption activists who claimed that Antasari's track record did not befit his new position. Though Antasari had held several senior prosecutorial posts,[2] they questioned his integrity. They claimed, for example, that he had sided with corruption suspect Djoko Chandra in a Bank Bali corruption case. They alleged also that he had delayed taking action against Tommy Suharto for the murder of Supreme Court Judge Syafudin Karatasmita; and, while head of the West Sumatra Attorney-General's Office (AGO), against members of the local parliament charged with corruption (Handayani, Kustiani *et al*. 2009). With his reputation in question, rumours circulated quietly through Jakarta that he may in fact, have been capable of ordering Nasruddin's murder.

The Constitutional Court's decision in the Bibit and Chandra case discussed in Chapter 5, however, drew speculation that the murder case against Antasari

was also fabricated as part of a coordinated endeavour to bring down the KPK. Some commentators feared that Antasari's successes had made him many powerful and well-connected enemies who then, through trumped-up charges, targeted him as an individual. This claim seems feasible. Despite initial scepticism about Antasari's ability to lead the KPK, under his leadership the KPK successfully pursued many 'big fish'. These included members of the national legislature, Bank Indonesia and the Public Prosecution Service itself.[3] Some commentators even claimed that Antasari's trial was revenge for exposing corruption in the public prosecution through the Urip Tri Gunawan case, discussed in Chapter 2. The KPK investigation resulted in the resignation of several senior AGO officials, including Deputy Attorney-General for Special Crimes Kemas Yahya Rachman and Director of Investigations Muhammad Salim (Handayani, Kustiani *et al.* 2009; Baskoro and Sutarto 2010).

This chapter does not seek to prove that Antasari was framed for Nasruddin's murder. It does, however, aim to demonstrate that the prosecution's case was so deeply flawed and the evidence presented so weak and equivocal that reasonable and independent judges could not have found Antasari guilty, by Indonesia's standard of proof, of masterminding the murder.[4] Even without rumours of frame-ups and revenge, the integrity of the trial would likely have been questioned. I will argue that the court's decision appears to have breached fundamental principles of Indonesian criminal procedure designed to prevent conviction on insufficient or unreliable evidence. It appears also to have ignored key facts and circumstances that significantly undermined the prosecution's case or otherwise cast doubt on Antasari's guilt.

This chapter begins by summarising the indictment against Antasari, read in open court by prosecutors on the opening day of his trial, as it appears in the case transcript. It then briefly describes the court's decision. Finally, it offers a critique of the decision, based on my own observations on Antasari's appeal documents and on media reports.

The indictment

As mentioned, prosecutors alleged that Antasari had participated in and persuaded others to commit murder, pointing to Articles 340 and 55 of the Indonesian Criminal Code. For convenience, the following summary of Antasari's indictment is divided into subheadings – the indictment did not employ them.

Alleged encounter between Antasari and Rhani and the blackmailing of Antasari[5]

In May 2008, Rhani met Antasari in room 803 of the Hotel Grand Mahakam to discuss Antasari's golf membership at the Modernland Golf Club in Tangerang. As Rhani was about to leave, Antasari gave her US$300, hugged her and asked her for sex. She refused, saying 'Another time, Pak'. He kissed her on the cheeks and she left.

Nasruddin found out about Antasari's advances. He asked Rhani to arrange another meeting with Antasari. Nasruddin had received a letter of appointment to a directorial position at PT Rajawali Nusantara Indonesia (RNI) – a state-owned pharmaceutical company, where he worked – but had not yet been installed in the position. He hoped that Antasari could use his influence to expedite the process.

Rhani contacted Antasari and they agreed to meet in the same room at the same hotel. This time, Nasruddin called Rhani and told her to leave her mobile phone on so that he could hear her conversation with Antasari. Antasari invited her to sit with him on the sofa in the room. Rhani made two requests of Antasari: that he re-register as a member of Modernland Golf Club; and that he help her 'relative' (*saudara*) with his appointment.

During a break in the conversation, Antasari asked Rhani to massage his back. During the massage, he turned around and kissed her lips and cheeks, opened her blouse and pulled down the left cup of her bra, saying, 'You are the one who said you wanted to meet again.' She refused his advances, saying 'Don't, Pak, don't', then turned off her mobile phone. Antasari ignored her, continuing to touch her body, squeezing, kissing and licking her breasts. Antasari then opened his fly and asked Rhani to hold his genitals while moving her hand up and down until he ejaculated. She complied with his request.

Antasari gave Rhani US$500. As she was leaving, Nasruddin burst into the room and angrily confronted Antasari: 'Why did you meet with my wife here? What were you doing to her? I could call a journalist right now and destroy your career.' Nasruddin slapped Rhani on the cheek. Antasari said, 'Don't do that, Pak, I still want to fix this nation.' He then embraced Nasruddin and invited him to stay and talk. After Nasruddin had calmed down, Nasruddin took Rhani home.

The following day, Nasruddin asked Rhani, under oath on the Holy Koran, to tell him what happened with Antasari in the hotel room. She told him. Between June and December 2008, Nasruddin visited Antasari's office five times. He reported alleged corruption within PT RNI and requested various favours, including assistance to obtain licenses and win tenders and help with his appointment.

In December 2008, Antasari received an SMS from Nasruddin which stated: 'You sexually harassed my wife at the hotel.' Antasari's SMS reply was 'No! Pak, don't accuse me so unkindly.' At Antasari's request, Nasruddin visited Antasari's office, where Nasruddin again accused Antasari of sexually harassing Rhani and sought assistance to obtain licenses. After Antasari refused, Nasruddin again threatened to go to the press and the DPR. On New Year's Eve in Bali in 2008, Antasari's wife, Ida Laksmiwati, received a telephone call from a person who said, 'Your husband is sleeping with another woman. That woman is here beside me.' Then a woman's voice said, 'I have slept with your husband.'

The police investigation and phone tapping

Panicked by these threats, Antasari asked Sigid Haryo Wibisono, a businessperson and chairperson of PT Pers Indonesia Merdeka (the company that publishes the Merdeka daily newspaper), to help him to 'overcome the terrorising by pacifying or getting rid of Nasruddin' (*mengatasi teror korban dengan cara mengamankan atau menghabisnya*). To this end, in early January 2009, Antasari met with Sigid and Police Commissioner Chairul Anwar at Sigid's house, where Antasari detailed the threats to which Nasruddin had subjected him and his family.

Antasari approached the Chief of Police (*Kapolri*) and sought police protection for himself and his family. The Chief of Police formed a team headed by Chairul to investigate the matter. Antasari told the team that Nasruddin used narcotics and that Rhani was not Nasruddin's wife.[6] The team investigated and, in mid-January 2009, raided hotel rooms in which Nasruddin and Rhani were staying in Kendari and Makassar. The team found no evidence of criminal behavior – no drugs were found and Nasruddin could prove that he and Rhani were married.[7] The team did, however, obtain photographs of the victim and his car, and his home and office addresses. The team recommended that Antasari make a formal police report. He refused, citing privacy reasons.

Antasari also ordered KPK employees, Budi Ibrahim and Ina Susanti, to trace and tap several telephone numbers associated with the threats, including the number that appeared on his wife's mobile phone during the Bali call. When Budi and Ina submitted their tapping report, they asked Antasari not to continue the investigation because it was a 'waste of time and money and was inappropriate'. Antasari responded: 'It is either me or he/she that is dead'.[8]

Planning the murder

Antasari met again with Sigid at Sigid's house, this time complaining that the police team had failed to stop the threats. Antasari asked Sigid to find a way to 'pacify or get rid of the threat' (*mengamankan atau menhgabisi ancaman*). Sigid told Antasari that he could ask Police Commissioner Williardi Wizar to find someone to get rid of Nasruddin. In late January 2009, Sigid arranged a meeting between Antasari and Williardi at which Antasari told Williardi of the threats and asked Williardi to 'get rid of' Nasruddin. In return, Antasari would help Williardi get promoted. Sigid offered to provide the necessary 'operational funds' (*dana operasional*). Eager for promotion, Williardi agreed and declared that he was 'ready to pacify' (*siap mengamankan*). Antasari gave Williardi the photographs and addresses that Chairul's team had obtained.

Williardi contacted Jerry and asked him to find someone to 'take the life' (*menghabis nyawa*) of Nasruddin, claiming that this was an 'official task' and that Nasruddin was a danger to the state. Jerry introduced Williardi to Eduardus at Jerry's house and they met again the following day, 2 February 2009, at around 7:20pm, at Ancol Bowling Arena café in North Jakarta. Jerry asked Eduardus to introduce him to someone to kill the person in the photograph and gave

him a brown envelope containing the photographs and addresses. Williardi explained to Eduardus that this was an official task that needed to be performed before the legislative election because Nasruddin was a danger to the state. After the meeting, Eduardus met Hendrikus in the car park, gave him the envelope and told him that the person in the photograph posed a threat to national security and that killing him was his official duty. Eduardus told Hendrikus that equipment and operational funds would be provided for the job.

Nasruddin continued to threaten Antasari. In February 2009, Antasari sent the following SMS to Nasruddin: 'Sorry, Mas, only the two of us know about this problem. If you blow it up you know the consequences.' Nasruddin showed this message to his lawyers Jeffry Luempouw and Etza Imelda Fitri.

At the beginning of March 2009, Williardi met Sigid at the Indonesia Merdeka newspaper office and asked for 500 million rupiah in 'operational funds' to 'get rid' of Nasruddin. Sigid delegated this task to Setyo, who gave the 500 million rupiah to Williardi. Before handing over the money, Sigid called Antasari and told him that the money was a loan. Antasari replied that he would 'pay it back later' (*nanti akan dicarikan gantinya*). Williardi gave Eduardus the money, who later gave 100 million rupiah to Hendrikus and ordered him to 'get rid of' Nasruddin as soon as possible. Hendrikus arranged for Fransiskus, Heri and Daniel to kill Nasruddin.

The killing was planned in an empty factory in Tangerang. On 14 March 2009, at around 2:30pm on Hartono Raya St, Modern Land, Tangerang, Nasruddin was leaving the golf course, chauffeured by his driver, Suparmin. In an Avanza Toyota, Amsi and Sei Lela blocked the path of Nasruddin's BMW as it slowed to traverse a speed hump. A dark-coloured Yamaha Scorpio motorbike driven by Bagol, with Danil riding pillion, approached the left side of the BMW. From a distance of around half a metre, Danil shot Nasruddin twice in the head with a Smith & Wesson .38 calibre revolver. The death certificate of 30 of March 2009, signed by Dr Abdul Mun'im Idries, a government doctor at Dr Cipto Mangunkusumo Hospital, concluded that Nasruddin's cause of death was two gunshot wounds, consistent with those from a Smith & Wesson .38.

After discovering that Nasruddin was dead, Sigid contacted Antasari and said 'Do you think we are in trouble?' Antasari replied, 'Calm down. I have already taken care of it.' In March 2009, Williardi went to Antasari's house with Sigid to talk about the career assistance Antasari had promised him.

The decision

As mentioned, the court found Antasari guilty. However, as discussed below, the court did not seem to endorse key allegations made in the indictment. The court divided its decision into five sections, with headings referring to so-called elements (*unsur*) that need to be satisfied for a conviction under Articles 55 and 340. Under each heading, the court set out the evidence adduced at trial which went to proving that element. In the interests of readability, I will provide only a brief summary of the court's conclusions under each heading.

Perpetrated or participated in (*melakukan atau turut serta melakukan*). The court concluded that Antasari was disappointed that the Chairul-led police team was unable to stop the threats. Antasari complained to Sigid, who arranged a meeting with Williardi at the end of January 2009. At the meeting, Williardi said that he was 'ready to pacify' (*siap mengamankan*) if Antasari helped him obtain a promotion. Antasari gave Williardi a brown envelope containing the photographs and addresses. Williardi met Eduardus through Jerry and Williardi asked Eduardus to have Nasruddin tailed for 24 hours. Eduardus contacted Hendrikus and asked him 'to do what Williardi intended'. The court confirmed that Eduardus asked Williardi for operational funds and that Williardi collected them from Sigid's office. Before giving Williardi the money, Sigid informed Antasari that he would be doing so. Antasari replied, 'Finish it first, then I will pay you back.' According to the court, there was, therefore, 'close cooperation' between Antasari, Sigid and Williardi, thereby fulfilling the element of participation.

To persuade (*menganjurkan*). The court briefly described the requirements of this element: at least two masterminds or 'persuaders' (*orang yang menganjurkan*) and a person persuaded to commit the crime (*dianjurkan*). The court referred to Article 55(1) of the KUHP and noted that only one alternative need be proven – that is, that the persuader gave or promised something; or misused power or influence; or used violence, threats or deception; or provided opportunity, means or information. The court accepted that Antasari and Sigid asked Williardi to find someone to stop the threats and gave Williardi a brown envelope containing photographs of Nasruddin. Williardi gave the envelope to Eduardus, who gave it to Jerry. Antasari also authorised Sigid to give 500 million rupiah in operational funds to Williardi, who then gave it to Eduardus. Therefore, the Court concluded, Antasari provided the opportunity, means or information for the crime.

Intent. The court briefly noted that intent encompasses 'knowing', 'intending' or 'realising would lead to the result'. As evidence of Antasari's intent to participate or persuade,[9] the court pointed to the testimony of Ina Susanti (a KPK information analyst) and Budi Ibrahim (KPK Director of Information and Data Management (*Pengelolaan Informasi dan Data* (Pinda)) mentioned in the indictment. They had declared that, on 22 January 2009, they confronted Antasari about his orders to tap Nasruddin's phone, which Budi Ibrahim complained wasted time and money and was inappropriate. Antasari responded: 'It is either him/her or me that will be dead' (*saya atau dia yang mati*). According to the Court, this indicated that Antasari intended the death of Nasruddin.

Premeditation. The court explained that premeditation requires a period of time, short or long, during which the defendant can clearly reconsider whether to commit the crime. Further, the perpetrator must be aware of the meaning and consequences of the act.[10] Premeditation, the court noted, is connected with the element of intent.

The court highlighted several incidents proven at trial, including the Ancol meeting, Eduardus's reports to Williardi about Nasruddin's whereabouts which were passed on to Sigid, Eduardus's tailing of Antasari, and Antasari's promise to repay Sigid. After describing Nasruddin's murder in a way akin to the indictment, using the testimony of Antasari's driver, Parmin, the court cited the testimony of Ruby Zukry Alamsyah, who had examined call data records of several defendants' mobile phones. This expert declared that, between 1 March and 17 April 2009, Hendrikus's mobile phone was used 74 times to contact (by call or SMS) Fransiskuks, 12 times to contact Hery Santoso, and once to contact Eduardus. Fransiskus's phone was used 76 times to contact Hendrikus and 30 times to contact Herry. Herry contacted Hendrikus 11 times and Fransiskus 44 times over the same period. This, according to the court, constituted 'circumstantial evidence' (*petunjuk*) of planning between them to murder Nasruddin. Therefore, the element of premeditation was shown.

Taking the life of another. Under this heading, the court included, almost verbatim, its description of the shooting from the 'premeditation' section. After noting that Irawati Arienda, Sri Martuti and Rhani had identified Nasruddin's body, the court mentioned Nasruddin's autopsy report, prepared by Dr Abdul Mu'min Idrus. The report revealed that his cause of death was two gunshot wounds – one to the back and the other to the left side of his head – made by 9 mm bullets which can be fired from a .38 Smith and Wesson. Finally, expert witness Ruby Zukry Alamsyah testified that call data records indicated that the mobile phones of Nasruddin, Hendrikus, Fransiskus and Hery were all in the vicinity of the shooting when it took place.

The court concluded that all elements of Article 340 had been proven and declared that, based on the valid evidence presented, it was convinced that Antasari was guilty of the crime for which he had been indicted. No defence applied. As for aggravating circumstances, Antasari had caused suffering to Nasruddin's children and wives; and his actions were particularly inappropriate given that he was a 'law enforcer' (*penegak hukum*). On the other hand, the court noted that Antasari was polite during the trial, had no previous convictions and had served the nation, particularly through law enforcement and corruption eradication activities. The court sentenced him to 18 years' imprisonment.

A critique of the decision

As mentioned, this chapter's main purpose is to critique the court's decision from an examination of the case transcript in light of current Indonesian law. I aim to cast doubt on whether the court should have, even legally could have, found Antasari guilty. My analysis draws on key objections made by Antasari's defence lawyers against the first-instance decision. Generally speaking, defence arguments made during criminal trials in Indonesia are not included in the formal court transcript. They are, however, usually set out and argued in the so-called 'memorandum of appeal' (*memori banding*), which I have obtained. The

memorandum attacks the court's findings and conclusions under each heading. It also raises evidence and issues that the court did not address in its decision. These, the defence claimed, were material and either undermined the prosecution's case or pointed towards Antasari's innocence.

In particular, Antasari's defence team complained about the validity of certain evidence on which the court appeared to rely upon in reaching its decision. For example, the defence argued that the Court should not have relied upon uncorroborated testimony – that is, testimony presented by only one witness during the trial. The defence team claimed also that some types of evidence, such as SMS messages, were not formally 'valid' under Indonesian law and could not, therefore, ground Antasari's conviction. It also protested that the court should not have accepted information contained solely in police records of interview or police statements (*berita acara pemeriksaan*, or BAP). This is particularly so if the interviewee either did not testify in court, subsequently retracted statements made during interviews, or gave testimony that contradicted the BAP.

To fully explain these defence arguments, and others canvassed below, some discussion of Indonesian criminal process and evidence law is necessary.[11] In most 'common law' countries – such as Australia, England and the United States – prosecutors must prove that the defendant is guilty 'beyond reasonable doubt'. Like many countries following the civil law tradition, however, Indonesia has a somewhat differently cast standard of proof. According to Article 183 of the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, or KUHAP), judges cannot convict a defendant unless they have the strong belief (*memperoleh keyakinan*) that a crime has taken place and that the accused committed it. This belief must be supported by at least two pieces of 'valid evidence' (*alat bukti*) (Article 183 of the KUHAP).

This rule, according to most commentators, provides minimum standards of protection for defendants, whilst retaining some judicial flexibility (Prakoso 1988; Sasangka and Rosita 2003; Subekti 2003). On the one hand, the rule requires judges to support their decisions with a minimum level of officially recognised evidence (the so-called objective element). The rule prevents judges convicting on anything less – such as a sole piece of evidence. On the other hand, a court can still refuse to convict, despite many pieces of valid evidence pointing to guilt, if it is not entirely convinced of that guilt because it considers the weight or persuasiveness of the evidence (*nilai pembuktian*) insufficient (the so-called subjective element).

Critically, not all types of evidence are categorised as *alat bukti* and, therefore, valid to prove guilt. Article 184 of the KUHAP 'exhaustively' (*secara limitatif)* defines 'valid pieces of evidence' to be:

a witness testimony (*keterangan saksi*);
b expert testimony (*keterangan ahli*);
c documents (*surat*);
d circumstantial evidence (*petunjuk*); and
e testimony from the accused, including an admission of guilt.

According to the KUHAP, police are to compile a case file of evidence obtained from their investigations. Once they finish investigating they hand this file over to prosecutors, who evaluate whether the evidence is sufficient to proceed to trial. If prosecutors think the evidence is insufficient, they can return the brief and request the police to investigate further (Article 138(2) of the KUHAP).

According to *Tempo*, prosecutors, when preparing their case, returned the Antasari file to police four times for additional evidence (Baskoro and Kustiani 2009). It is quite common for prosecutors to return files, but doing it so many times is, in the author's observation, rare. This reinforced concerns – raised by Antasari's lawyers, legal commentators and the press – that the evidence against Antasari was weak and that prosecutors had, when sending back the case file, asked the police to manufacture additional evidence.

The physical evidence: murder weapon, bullets and envelope

The court appeared to accept that the .38 calibre Smith and Wesson revolver produced by the prosecution was the weapon used to kill Nasruddin. Yet several expert witnesses testified that this was very unlikely to be the murder weapon. In particular, the court ignored the testimony of expert Roy Haryanto, who asserted that the gun was in such poor condition that it would have been very difficult to shoot accurately. In particular, he testified, the trigger was so stiff that it could not be fired straight because pulling it would jerk it away from the target.[12] This, combined with heavy recoil, would have made it virtually impossible to shoot the victim twice leaving wounds that were close together, especially whilst the shooter and the target were both moving. He estimated that the assassin would have needed around 4,000 practise shots to master the gun, yet, according to defence claims, the convicted hitmen had very little or no gun-handling experience.

Further, experts testified that Nazarudin's bullet wounds could not have been made by a .38 Smith and Wesson. Dr Abdul Mun'im Idries, a forensic expert from the University of Indonesia, testified that, after conducting an autopsy, he had concluded that the bullets that killed Nazarudin were 9 mm in diameter, and wrote this on the death certificate. Such bullets, he testified, could not be fired by a .38 weapon. (This was confirmed by Dr Maruli Simanjuntak, a forensic expert, who testified that a .38 calibre weapon can use only .38 calibre bullets, not 9 mm bullets. Expert Roy Haryanto also noted that the 9 mm bullets were shot from an automatic weapon and could not have been fired from a 38 mm revolver.) Rather, Idries continued, Nasruddin was probably shot with a 'FN Five-seven' pistol, which, he claimed after examining the bullets and casings, was in good working order, unlike the Smith and Wesson that prosecutors produced. Idries also testified that after he had completed the autopsy he was telephoned by Mr Kamal from the Central Forensic Laboratory who said that the Metro Jaya Police Detectives Sub Unit Head wanted him to remove the reference to the 9 mm bullet from his report. He refused (Baskoro and Sutarto 2010). Defence lawyers alleged that this incident revealed a conspiracy against Antasari – a claim that is addressed below.

Fundamental to the prosecution's case linking Antasari to Nasruddin's murder was the claim in the indictment that Chairul gave Antasari a brown envelope containing photographs and addresses of Nasruddin that Chairul's team had obtained when investigating Nasruddin. According to the indictment, Antasari then gave the envelope to Williardi, who passed it on to others involved in the murder (Baskoro and Sutarto 2010).

Antasari, however, denied that the envelope contained photographs or addresses. He admitted to taking a brown envelope to Sigid's house, but claimed that it was not for Williardi. Rather, it contained a proposal for cooperation between the KPK and the *Merdeka* newspaper, which Sigid directed. Neither side's claim could be tested at trial, however. Although police had seized the envelope when interrogating Antasari on 4 May 2009, for reasons that were not adequately explained at trial, prosecutors did not tender it as an exhibit. Yet the court did not mention the failure to adduce nor draw any inferences from that failure. Instead, the Court appeared to simply accept prosecutors' claims about the contents of the envelope and that Antasari had given the envelope to Williardi, despite not formally being proven at trial.

Reliance on sole testimony of Sigid

At least three critical planks of the prosecution's case, and of the court's decision, relied solely on the testimony of one witness: Sigid. First, only Sigid testified that Antasari was disappointed with the performance of the Chairul-led police team. This appears to go towards explaining why Antasari might have approached Williardi. Second, Sigid alone testified that Antasari asked Williardi to find someone to help 'pacify the terrorising'. Without this statement, very little, if any, direct evidence indicated that Antasari ordered Williardi to do anything about Nasruddin. Third, only Sigid revealed that Antasari told him, 'Finish it first, then I will pay you back.' Without this testimony, it would have been very difficult to show that Antasari knew that Sigid gave the money to Williardi, or that Williardi gave the money to Eduardus. The court might not, therefore, have been able to conclude that Antasari had 'intent' on the ground that he 'authorised' the payment.

Relying on the testimony of a sole witness, however, appears to breach the KUHAP. As mentioned, the Code requires that, in order to be considered *alat bukti*, witness testimony must be corroborated by at least one other witness (Article 185(2)) or another piece of valid evidence (Article 185(3)). One witness equals none (*unus testis nullus testis*) (Handayani and Aprianto 2009).

The court's reliance on Sigid's testimony is also problematic because other witnesses contradicted key aspects of Sigid's testimony during the trial. For example, Williardi testified that he did indeed meet with Antasari and Sigid, but that they only discussed tailing Nasruddin for 24 hours because of drug allegations and other alleged criminal activity. This, Williardi claimed Antasari said, was necessary because Chairul's team was taking too long to report. Antasari claimed, during his trial, that he met at Sigid's house only to discuss Williardi's

promotion (Handayani and Aprianto 2009). Sigid's employee, Setyo, who served tea during the meeting between Sigid, Williardi and Antasari, did not hear Williardi declaring 'readiness to pacify'. Members of the Chairul-led team who testified did not indicate that Antasari was disappointed with their work. Yet the court did not address these inconsistencies in its decision, even if merely to dismiss them as insignificant.

Police statements doctored and revoked

Antasari's defence lawyers claimed that the court accepted key facts that were obtained only from police records of interview, but which were not corroborated in court when those witnesses testified. At trial, most of those whom prosecutors claimed were involved in the plot retracted their police statements implicating Antasari.

Williardi's BAP of 30 April 2009 was arguably the most important piece of documentary evidence that prosecutors sought to adduce as *alat bukti.* In it, Williardi declared that Antasari ordered Williardi to have Nasruddin killed. Without it, only Sigid's evidence supported the claim that Antasari ordered the murder. As mentioned, however, the statement or testimony of a sole witness is insufficient under Indonesian law to ground a conviction. To 'validly' prove Antasari's involvement, prosecutors needed testimony or other evidence to corroborate Sigid's evidence.

At trial, however, Williardi testified that his initial police statement did not implicate Antasari. Wiliardi claimed that senior police – including National Police Deputy Chief Detective Inspector General Hadiatmoko, Director of the Criminal Investigations Unit of the Jakarta Raya Police, and Senior Commander Muhammad Iriawan – pressured, and eventually ordered, him to change his police statement to incriminate Antasari (*Tempo English Edition* 2009b). Williardi's statement was, accordingly, amended on 30 April 2009 to include Antasari's order to assassinate Nasruddin. On 18 May 2009 Williardi revoked his statement of 30 April 2009 (Baskoro and Sutarto 2010).

During the trial, prosecutors sought to adduce Williardi's initial BAP as *alat bukti* in its own right. Put simply, without Williardi's police statement, the prosecution had no case at all. Yet the admissibility of police statements is a vexed issue under Indonesian law. The use of documentary evidence is restricted under Article 184(1)(c) of the KUHAP. This provision exhaustively lists documents with *alat bukti* status. These are 'official documents' produced by 'public officials' about 'events or circumstances they heard, saw or experienced'. They include official reports (*berita acara*) (Article 187(a)); documents containing expert opinions (Article 187(b)), including affidavits; and 'other documents', provided they 'have a connection with the substance of another piece of evidence' (Article 187(c)).

Indonesian lawyers disagree over whether police statements fall within these provisions. On the one hand, in many Indonesian criminal cases prosecutors rely heavily on police statements in the absence of other evidence (*Hukumonline*

2010l). Clearly, some prosecutors think that police statements can stand alone as *alat bukti*. However, there is little to commend this view and few other sectors of Indonesia's legal community support it. A police officer (a 'public official') who witnesses or draws up a record of interview or police statement cannot possibly verify the accuracy or truth of what the interviewee declared therein; after all, the officer personally will not usually have experienced the events or situation described in the statement as Article 184(1)(c) requires. Rather, the officer can only attest that the interviewee made that statement.

In some cases, prosecutors have argued, pointing to Article 184(1)(c), that if interviewees make their police statements under oath, their statements can be considered *alat bukti* (*Hukumonline* 2010m). This provision requires that, to be *alat bukti*, all documents must be made under an oath of office or another oath. But these prosecutors seem to have misinterpreted the provision. Its purpose is clearly to require a court to exclude as *alat bukti* all documentary evidence that is not made under oath. A record of interview made under oath cannot be *alat bukti* unless it is a type of document referred to in Article 187.

Williardi was not the only witness to retract. Others claimed that they had been intimidated into changing their statements to implicate Antasari. Eduardus, for example, claimed that he was tortured, with electrodes being clipped to his genitals during police interrogation (*Tempo English Edition* 2010a: 32). Eduardus eventually revoked his BAP.[13] Some of the hitmen claimed that they had been coerced, even tortured, into confessing their involvement, but in fact were not involved at all. During their own trials, many of those found guilty of involvement in the murder retracted their statements indicating that Antasari was its 'mastermind'. Yet, the court did not consider these evidentiary issues, nor the retractions and their effect, if any, on the prosecution's case.

Inferences

Even though prosecutors charged Antasari with premeditated murder, witness testimony revealed very little, if any, explicitly declared intent to 'kill' (*membunuh*) Nasruddin from anyone found to be involved in the plot. The preponderance of testimony from key players – Sigid, Williardi and Eduardus – referred to Williardi arranging only for Nasruddin to be 'followed'. Even the testimony hinting of an intention to move beyond following Nasruddin to more sinister intervention stopped short of referring to 'murdering' or 'killing'. Sigid testified that he forgot whether Williardi said 'ready to pacify' (*siap mengamankan*) or ready 'to do it' (*siap melakukan*). He also testified that he heard Antasari say that 'concrete action must be taken so that Nasruddin knew that Antasari had the power to bring the threats to an end' (p. 23). This appears to be evidence of a plan to do something to stop Nasruddin continuing to blackmail Antasari, but it hardly points directly and unequivocally to a plan to murder.

Even in some parts of the indictment, prosecutors alleged merely that Antasari asked Sigid to find a way to 'pacify or get rid of the victim' (*mengamankan atau menghabisi korban*), and that Williardi said that he was willing to safeguard or

pacify. Only in three parts of the indictment and once in Eduardus's testimony is mention made of *'menghabisi nyawa'* Nasruddin.[14] It means to 'take the life of' and it is the only direct reference to killing in the indictment, testimony and decision. *Menghabisi* is used on its own many times in the transcript. It can, depending on the context in which it is used, certainly mean 'getting rid of' in the murdering sense, but can also have a broader, less ominous meaning. It could, for example, conceivably mean to get Nasruddin 'out of the way', such as by setting up Nasruddin for a crime. Indeed, in his testimony, Sigid used the word in this sense. He admitted agreeing to help Antasari to 'get rid of' Nasruddin, such as by implicating him in a corruption case.[15] Given that the court ultimately found Antasari guilty of ordering Nasruddin's murder, it is perhaps surprising that, in its reasoning, the court described the plot as only to safeguard (*mengamankan*) Antasari rather than to kill (*membunuh*) or even to *menghabisi* Nasruddin. In particular, it is difficult to see how the court concluded that Antasari had authorised the funds to commit the crime without a clear finding that the money was for murdering, not following, Nasruddin.

The prosecution's case relied heavily, too, on drawing sinister inferences from various SMSs allegedly received and statements allegedly made. For example, in its decision, the court referred to the evidence of KPK officials Budi Ibrahim and Ina Susanti, who stated that, after they advised Antasari against using his KPK authority to continue tapping Nasruddin's mobile phone, Antasari responded: 'It is either him/her or me that will be dead.' The court relied almost exclusively on this statement as evidence that Antasari had intent to kill Nasruddin.[16] Yet the court did not explain how it had construed Antasari's response and did not reveal any assumptions it made. In the absence of such an explanation, the court's ultimate finding on intent is unconvincing. The threat itself is far from direct. It did not indicate beyond doubt that Antasari planned to order Nasruddin's killing.

Antasari's response raises a further question: if Antasari's life was in danger, from whom? No evidence indicated that Nasruddin or anyone else had threatened to kill Antasari. A plausible alternative explanation is that Antasari's response reflected his frustration about being blackmailed – if the statement was ever made. The defence claimed that, like other evidence discussed above, this was doctored and unreliable. According to Antasari's appeal documents, Budi's initial police statement did not include Antasari's response. It was later amended to include it. The defence alleged that Ina Susanti's statement was then doctored to match Budi's amended statement. Surprisingly, given the importance of his testimony, Budi was not examined at trial. Antasari's lawyers, therefore, had no opportunity to test the veracity of Budi's police statement. If the defence's claims about Budi's statement are true, the court should not have relied solely on the testimony of Ina Susanti which, though given in court, was engineered to match Budi's police statement.

Similar observations can be made about the SMS that prosecutors alleged Antasari sent to Nasruddin: 'Sorry, Mas, only the two of us know about this problem. If you blow it up you know the consequences.' (However, this SMS is

of marginal importance: the court did not refer to it in the decision, as discussed below.) Again, concluding that this statement carries a threat of murder requires conjecture. The message is too ambiguous to be considered threatening itself without, at the very least, evidence being led to uncover the consequences Antasari intended. Antasari could well have been threatening that, if Nasruddin continued harassing him and his family, he would not perform any favours the prosecution alleged Nasruddin sought.

Did the prosecution prove its case?

Prosecutors made several allegations in the indictment that the court virtually ignored in its decision. Two will be discussed here, both of which appeared central to the prosecution's case against Antasari. The first allegation was that Antasari 'sexually harassed' Rhani in the Grand Mahakham. About the encounter, the court noted only that, as Rhani was about to leave the hotel room Nasruddin suddenly appeared, hit Rhani, pushed her back into the room, and threatened Antasari with reporting the 'affair' to journalists and the DPR. The incident is important in establishing Antasari's motive for murder: to stop Nasruddin publicly revealing his so-called harassment of Rhani. The second allegation that the court ignored was that Antasari threatened to kill Nasruddin in an SMS, mentioned above. Presumably, prosecutors had sought to show that this threat evidenced intent to kill, or to argue that Antasari had made good on the threat by ordering Nasruddin's assassination.

I proffer two explanations for the court disregarding these allegations. The first explanation is that the court thought the prosecution had not successfully proved the allegations, but simply did not declare this in its decision. The prosecution certainly had trouble establishing any of its claims it made about the hotel encounter. Only Rhani's testimony directly supported the indictment but, as discussed above, the testimony of one witness is not valid *alat bukti*.

Prosecutors attempted to corroborate Rhani's testimony that a sexual encounter took place by adducing an audio recording of the encounter that expert Rubi Zukri, a digital forensics specialist, extracted from the memory card of Nasruddin's mobile phone. If the prosecution's strategy was to bolster Rhani's testimony, the strategy was misguided: the recording, which was broadcast on live television, was barely audible,[17] consisting mainly of muffled sounds and Rhani laughing. Even if the recording had been clear and indicated that Antasari sexually harassed Rhani, in order to 'get in' to support Rhani's testimony, the expert who analysed the recording would have needed to verify that the recording was a recording of the encounter, as alleged. The expert, however, could not do this. He was only able to verify that he found the recording on Nasruddin's phone and, using voice recognition technology, that the voices were Rhani's and Antasari's.

Prosecutors were also unable to convincingly show that the allegedly threatening SMS was sent by Antasari, or was even sent at all. The only evidence that the threatening SMS existed was the testimony of Jeffy Lumampouw, Nasruddin's family lawyer, and Etza Imelda, a lawyer who worked for

Lumampouw. They testified that Nasruddin showed them the SMS during a meal at a restaurant (Ramidi, Kustiani *et al.* 2009; *Tempo English Edition* 2010b). By Imelda's testimony, the so-called threatening SMS displayed Antasari's name, but not the telephone number of the sender. Information technology expert Dr Agung Harsoyo testified that the SMS displaying Antasari's name could well have been engineered (*direkayasa*) – that is, it could have been sent anonymously through an internet service. The expert even demonstrated during the trial how this could be done. It was quite possible, then, according to Antasari's defence team, that a conspirator who wanted to create the appearance of animosity between Antasari and Nasruddin sent the SMS, thereby giving Antasari a motive for murder. (Further evidence that, according to the defence, pointed to a conspiracy is discussed below).

In any event, the prosecution could produce no physical evidence indicating that the SMS was ever sent. Information technology experts Ruby Alamsyah and Dr Agung Harsoyo examined Nasruddin's mobile phone but could not recover the threatening message from it, though Ruby Alamsyah did successfully extract parts of several other messages sent from Antasari's to Nasruddin's phone. These messages had remained on their memory cards despite being deleted.

The court might also have doubted whether the recording of the alleged hotel encounter or the so-called threatening SMS were even types of evidence that Indonesian law recognises. Article 184 of the KUHAP, set out above, restricts the types of evidence that can be formally adduced as *alat bukti* to those considered most reliable in 1981, when the KUHAP itself was enacted. The KUHAP does not mention electronic and other 'newer' types of communications such as emails, SMSs, internet transactions and even sound recordings, videos and photographs. Because they are not categorised as *alat bukti* under Article 184, these types of evidence cannot be solely relied upon to prove guilt. (An explanation to this effect was given during the trial by the well-regarded criminal law expert Professor Andi Hamzah of Trisakti University). At best, this evidence can be used to support other 'valid' evidence. At worst, such communications are simply disregarded by judges (Harahap 2000).

The second possible explanation for the court largely disregarding the alleged encounter and SMS is that the court thought that they were not as important to the prosecution's case as did the prosecution. This, too, seems difficult to accept, particularly given the scant 'valid' evidence indicating Antasari's guilt, as shown above.

Either way, prosecutors emphasised these two allegations in the indictment – particularly by including explicit details of the 'encounter'. The court should, therefore, have discussed the extent, if any, to which the prosecution's failure to establish them weakened the case against Antasari. Because Indonesia follows the civil law tradition, its judicial system employs an inquisitorial, not adversarial, model under which judges can actively seek out the truth. Yet, fundamentally, prosecutors must still 'convince' the judges of the elements of the crimes for which they indict defendants.

Conclusion: the conspiracy theory

As this chapter has shown, most of the evidence against Antasari was weak, unreliable or contradictory. The defence convincingly undermined virtually all of the allegations made against Antasari in the indictment. Antasari's lawyers did not stop there, however. In the appeal documents, they put forward their own case theory: that Antasari was framed for Nasruddin's murder as part of a systematic attempt to bring down Antasari and the KPK. They pointed to several pieces of evidence supporting their theory. First was the testimony of former Senior Commander Susno Duadji, who, quite unexpectedly, appeared late in the trial as a witness for Antasari. He testified that when he was National Police Chief Detective, another police team, called the 'Antasari Motive-Finding Team' (*Tim Pencari Motivasi Antasari*), led by Deputy Chief Detective Inspector General Hadiatmoko, was tasked with finding something to pin on Antasari. This team, Susno claimed, reported directly to the Chief of Police. Susno testified, however, that, even though he was more senior than Hadiatmoko, he did not know the identity of other members of the team or who established it.

Susno's testimony seems particularly significant in light of Williardi's testimony, corroborated by Susno, that Hadiatmoko forced him to change his police statement so that it implicated Antasari in Nasruddin's murder (Parera *et al.* 2010: 14–15). According to Williardi's testimony, Hadiatmoko promised that if he changed his statement, he would receive only internal disciplinary action for wrongful use of his official authority. He would not be detained, nor face criminal sanctions (Baskoro and Sutarto 2010; *Tempo English Edition* 2009b). After all, Hadiatmoko explained to Williardi, they were aiming to bring down Antasari, not Williardi. This version of events seems also to accord with testimony given by Williardi's wife, Novarina, who entered the interrogation room when Williardi was with Hadiatmoko, the Director and another investigator. She heard Hadiatmoko saying 'You won't be sacked. You're like family. The important thing is that if Antasari gets off, you also get off. I wouldn't want Antasari to get off and you to suffer harsh penalties.' Novarina testified that Williardi replied, 'In the name of God, Antasari never gave me orders.'

The second piece of evidence supporting the defence conspiracy theory came from expert witness Zukri. He testified that the recording Nasruddin made on his phone of the 'encounter' between Antasari and Rhani contains the voice of an unidentified male. According to Zukri, the voice tells Nasruddin that Rhani has already entered room 803. Antasari's defence lawyers claimed that this indicates that Rhani and Nasruddin were part of a plot to set up Antasari, engineered by others.

Third, the defence claimed that police seized closed circuit television footage from a security camera installed at Sigid's house. The footage was said to capture meetings between Antasari, Sigid and Williardi, but prosecutors did not enter it as evidence. The defence questioned the prosecution's failure to tender this evidence, claiming that it might have settled whether Williardi did obtain the brown envelope at the meeting, and might also have revealed that someone

else attended the meetings – someone, hitherto unidentified, who was part of the conspiracy. The final piece of evidence supporting the defence's case was the testimony of Idries, the forensic expert who conducted Nasruddin's autopsy. As mentioned, he was asked to alter his autopsy report to remove the reference to 9 mm bullets. This, the defence claimed, pointed to a high-level conspiracy led by senior police.

Although the conspiracy claim seems feasible, it is difficult to objectively evaluate its strength. The pieces of evidence upon which Antasari's lawyers based the claim were of varying reliability. In particular, Susno's apparent involvement in several other political and police scandals has brought his credibility into question.[18] And, despite Zukri detecting a third voice, the recording played in court was almost inaudibly muffled, making it hard for the untrained ear to detect the voice.

Yet, as discussed, the court did not even mention these pieces of evidence in its decision, if only to dismiss them as unreliable. This significantly reduces the convincingness of the court's decision. Did the court inadvertently overlook the evidence? If so, then its professionalism is brought into question: failure to consider such important evidence is hard to explain except by incompetence. Or did the court refrain from discussing this evidence because doing so would have exposed gaping holes in the prosecution's case and in its own decision? What is clear, however is that the highly questionable veracity and legality of the evidence against Antasari, combined with the feasibility of the defence's conspiracy theory, raised significant doubt about Antasari's guilt. It is hard to see how a competent and impartial court could decide that Antasari was 'validly and convincingly' proved to have ordered the murder. Antasari should probably have been acquitted.

In early February 2011, the National Commission on Human Rights (Komnas HAM) announced that it would investigate the fairness Antasari's trial. The probe was launched in response to claims of impropriety – made by Gayus Tambunan, infamously convicted of corruption within the Indonesian tax office – about prosecutor Cirus Sinaga, who led his and Antasari's prosecution (*Jakarta Post* 2010f). Antasari has since announced that he will seek a final review of his case with the Supreme Court (*Hukumonline* 2011b). At time of writing, neither of these processes had been completed.

5 The Bibit and Chandra case

> [The Bibit and Chandra case is] at best … unhealthy institutional competition and at worst subversion and manipulation of Indonesian law for the purpose of preserving the 'corruption network' … The case illustrates, in bold face, the nature and extent of corruption within the legal system.
>
> (*Hukumonline* 2010s: 4)

Overview

This chapter analyses the principal legal issues arising from the Bibit and Chandra 'saga'. In mid-2009, police charged two KPK commissioners – Bibit Samad Rianto and Chandra M. Hamzah – with bribery and misuse of authority. Both were suspended from office. As police investigations progressed, however, it became clear that the evidence against them was scant and weak, and credible suspicions emerged that they had been framed as part of a plot to discredit and ultimately paralyse the KPK. Yet, police continued pursuing them and prosecutors sought to bring them to trial. Public support mounted for Bibit and Chandra, as did condemnation of police and prosecutors involved in the case. In response, in early November 2009 the President established a team of legal experts to independently review the evidence against Bibit and Chandra and to investigate allegations of police and prosecutorial misconduct. Meanwhile, Bibit and Chandra lodged a challenge against their anticipated dismissals with the Constitutional Court. During the first full hearing, wiretapped conversations between senior police and prosecutors, and people the KPK were investigating, were played in open court. The recordings revealed plans to set up Bibit and Chandra. Senior law enforcement officials were implicated and forced to retire. Bibit and Chandra were reinstated to the KPK. Eventually, in late 2010, prosecutors formally dropped the case against them, citing the public interest.

In this chapter I present a largely chronological account of the saga. I aim to show that if President SBY had not acted and the Constitutional Court had not intervened (albeit on tenuous legal grounds), Bibit and Chandra may have faced trial on these trumped-up charges. And, if Antasari's trial is an accurate guide, they, too, might have been convicted and imprisoned, after highly questionable legal processes.

Police investigations and charges

Bibit and Chandra were investigated and charged on two distinct grounds. The first was that they had received bribes to drop a KPK investigation; the second was that they had misused their authority to issue and revoke travel bans. As the saga continued, however, both the media and police appeared to conflate these grounds, particularly by alleging that Bibit and Chandra had received bribes to issue and revoke the travel bans. Regardless, evidence was scant to support any of the charges.

Two weeks after Antasari's detention, in mid-May 2009, on suspicion of murdering Nazarudin Zukarnaen, police released a four-page statement bearing Antasari's signature (*Jakarta Post* 2009). The statement revealed that the KPK had investigated businessman Anggoro Widjojo for allegedly bribing the former chairperson of the national parliament's Forestry Commission – Yusuf Erwin Faishal of the National Awakening Party (PKB) – and Forestry Ministry officials. The purpose of the bribes, the statement alleged, was to ensure that Anggoro's company, PT Masaro Radiokom, was named sole provider of the Forestry Ministry's radio communications system without a tender in 2007 (Rayda 2009a; Pratama 2010). The statement claimed that Anggoro, through an intermediary, Ari Muladi, had offered 6.7 billion rupiah in bribes to senior KPK officials to drop this investigation (Haryadi 2009).

Antasari also gave police a recording that he had made of a conversation between himself and Anggoro in Singapore. In it, Anggoro admitted that KPK officials had been paid to drop the investigation. According to media reports, in the recording Anggoro also mentioned 'Ade' and 'Jasin', presumably referring to then KPK Director of Investigations, Ade Raharja, and KPK Commissioner Mochammad Jasin (Kustiani, Syafira *et al.* 2009). Antasari claimed also to have met, in Indonesia, Ari Muladi, who admitted to receiving money from Anggoro and giving it to KPK Deputy for Enforcement Ade Raharja to pass onto KPK commissioners (Dhyatmika, Hadad *et al.* 2009). Antasari did not record this conversation, however.

Claiming to be pursuing allegations made in Antasari's statement, police then summoned for questioning the remaining four KPK commissioners; KPK Director of Investigations, Iswan Elmi; KPK Legal Bureau head, Khaidir Ramli; KPK Task Force investigator, Arry Widiatmoko; and KPK investigator, Rony Samtana (Kustiani, Syafira *et al.* 2009). After investigating further, police named Bibit and Chandra as 'suspects' (*tersangka*) on 15 September 2009. As discussed below, official suspects cannot serve as KPK commissioners. SBY issued Presidential Decision No 74/P of 2009 on 15 September to formalise their suspension.

Bibit and Chandra were not initially charged with receiving bribes, however. Instead, police alleged they had misused their authority by issuing and revoking travel bans against Anggoro and Djoko Tjandra – another suspect under KPK investigation. In particular, the police pointed to a revocation, signed by Chandra, of a travel ban against Anggoro (Kustiani, Syafira *et al.* 2009). Police

alleged that individual KPK commissioners lacked power to issue and revoke travel bans, pointing to Article 21(5) of the KPK Law which states that KPK commissioners are to work collectively (*bekerja secara kolektif)*. Bibit and Chandra were formally charged with misuse of power under Article 23 of the Anti-Corruption Law and Article 421 of the Criminal Code; for extortion under Article 12E of the Anti-Corruption Law; and for attempt under Article 15 of the Anti-Corruption Law (Chalid *et al.* 2010: 9).

The move attracted significant public ire and fuelled speculation that the charges were trumped-up and part of wider efforts to disgrace, perhaps even destroy, the KPK (Rayda 2009b). Several causes of concern were aired, including that Bibit and Chandra had not been named in Antasari's statement; that the legal basis for the charge was weak; and that the evidence against them was unreliable, perhaps even engineered. To support the charges, police had produced what they claimed was the official KPK repeal of Anggoro's travel ban, signed by Chandra on 5 June 2009. The document was, however, widely condemned as fake. The logo and several letterhead details were inconsistent with official KPK templates, and the signature purporting to be Chandra's appeared to have been falsified (*Hukumonline* 2009e).

With little prospect of succeeding with the misuse of authority allegations, police revised their charges against Bibit and Chandra. Police identified them as the KPK officials who, according to Antasari's statement, had received bribes to drop the investigation into Anggoro. Police now alleged, however, that Bibit and Chandra had received the money from Anggodo, Anggoro's brother (Ramidi, Desyana, and Nilawaty 2009). Police claimed that they had 16 witnesses to support this charge, naming Antasari, Anggoro, Anggodo and Ary Muladi (Ramidi, Desyana and Nilawaty 2009). The police handed over the dossier of evidence to prosecutors, who categorised the case as 'P 21'. This label is given to cases that prosecutors think are supported by enough evidence to proceed to trial (*Hukumonline* 2010s). On 29 October 2009, Bibit and Chandra were detained pending their trial (*Antara News* 2009).

Yet the evidence against them still appeared extremely weak. In particular, reliance on testimony from Antasari, Anggoro, Anggodo and Ary Muladi seemed unwise. Ari Muladi claimed that the statement he gave to police which implicated Bibit and Chandra was false, and he retracted it (*Hukumonline* 2010s). Anggoro and Anggodo lack credibility as witnesses: Anggodo had been convicted for attempting to bribe KPK officials to drop the case against his brother, Anggoro, and in August 2010 had been sentenced to four years' imprisonment (Rayda 2010a); Anggoro was a fugitive wanted for bribing Yusuf Erwin Faisal and forestry officials, as mentioned above.

This left only Antasari's allegations, made in his police statement. Reliance upon Antasari's statement to pursue Bibit and Chandra was, however, highly problematic for two primary reasons. First, as discussed in Chapter 4, one witness statement is insufficient to ground a conviction under Indonesian law, even if the witness confirms the statement at trial. Second, Antasari's credibility as a witness was dubious. I found no media reports indicating that Bibit and

Chandra were mentioned in Antasari's statement – it named only other KPK members. It seems, then, that Antasari would have needed to 'correct' his statement when testifying, thereby discrediting himself. Further, despite the problems with his trial discussed in Chapter 4, Antasari is a convicted murderer. Judges might, therefore, have attributed little weight to his allegations. Also, some commentators suspected that he may have negotiated with police and prosecutors, agreeing to implicate Bibit and Chandra in return for reducing charges against him (Dhyatmika, Handayani *et al.* 2009).

There were, however, far greater flaws in the prosecution's case. Prosecutors could prove that Anggodo gave Ari Muladi 5.5 billion rupiah at Hotel Peninsula, Jakarta in three tranches: on 11 August 2008, 13 November 2008 and 13 February 2009. Police had documents evidencing the payments, and Anggodo had confessed (Aprianto and Megarini 2009). They could not, however, show that Bibit, Chandra, or any other KPK official, had received any of this money. Further, prosecutors could not account for Bibit being in Peru when he was alleged to have received one of the payments (*Hukumonline* 2010s).

Prosecutors did, however, claim to hold one final trump card. In late 2009, senior prosecutors publicly and repeatedly declared that they possessed 64 recordings of telephone conversations between Ari Muladi and KPK Deputy for Enforcement Ade Raharja. These recordings, they claimed, supported the case against Bibit and Chandra and would be adduced at trial (Chalid *et al.* 2010: 6, 10). Police Chief General Bambang Hedarso Danuri and Attorney-General Hendarman Supandji told the national parliament about the recordings during formal hearings on 5 and 9 November 2009. As discussed at the end of this chapter, however, even these assertions ultimately supported claims that the case against Bibit and Chandra was engineered: in mid-2010, during the trial of Anggodo in the ACC, police and prosecutors were ordered to produce the recordings, but they could not.

SBY's Interim Emergency Law

As Bibit and Chandra's trial loomed, significant public pressure was brought to bear on President SBY to support the KPK. Only months earlier he had been re-elected at least partly because he promised to continue fighting corruption. Yet to this point he had made several statements critical of KPK. In 2006 he had warned that the anti-corruption drive should respect the presumption of innocence (Hotland and Taufiqurrahman 2008), and, in 2008, had complained of the KPK's 'hyperactivity' in its investigations and prosecutions after the KPK had conducted raids on the offices of some parliamentarians (*Hukumonline* 2008a). By early July 2009, as the Antasari, Bibit and Chandra scandals intensified, SBY was quoted in *Kompas* newspaper as saying:

> Regarding the KPK, I must caution it. Power must not go unchecked. This KPK has become an incredible powerholder. It seems to be accountable only to God. Be careful.
>
> (Dhyatmika, Handayani *et al.* 2009)

On 21 September 2009, he issued a law giving himself power to appoint KPK commissioners if three or more commissioner positions became vacant.[1] This law took the form of a Government Regulation in Lieu of a Statute (*Peraturan Pemerintah sebagai Pengganti Undang-undang* (PERPU)), which I translate as 'interim law'. Article 22 of the Constitution grants the president power to pass these laws in emergencies. They have legal authority equivalent to ordinary statutes. Article 22 also requires that they be ratified by the national parliament, during its next sitting. If not ratified, they lose the force of law.

Prior to the Interim Law, Article 33 of the KPK Law had required that KPK commissioner vacancies be filled using the procedures for selecting and appointing commissioners. As mentioned in Chapter 1, this process is rigorous. It requires a selection committee to test and vet applicants, the president to propose candidates to parliament, and parliament to put applicants through a fit and proper test.

SBY's Interim Law sought to add two provisions to the KPK Law: Articles 33A and 33B. Article 33A provided that if fewer than three of the five KPK commissioner positions were filled, the president was to appoint temporary commissioners to fill the vacant positions. (Presumably, if only one or two positions became vacant, then no resort to Articles 33A and 33B could be had; the ordinary Article 33 procedures would be applied to fill the vacancies.) Under Article 33A, temporary commissioners had the same rights, powers and obligations as did commissioners serving full terms. Temporary commissioners needed to meet the formal criteria for appointment provided in Article 29 of the KPK Law: physical and mental health; qualifications or experience; a law or relevant degree; irreproachable character, reputation and integrity; and relinquishment of other positions while serving on the KPK. Article 33B required temporary commissioners to give up their positions if suspended commissioners were reinstated. On 6 October 2009, under these provisions, SBY swore in three temporary KPK Commissioners: Mas Achmad Santoso, Waluyo and Tumpak Hatorangan Panggabean.[2]

Most media and legal commentators strongly criticised SBY for issuing the Interim Law. Indeed, key non-government law reform organisations – including Indonesia Corruption Watch, the National Law Reform Consortium, the Centre for Study of Law and Policy, the Institute for Study and Advocacy for Judicial Independence, and the Commission for Missing Persons and Victims of Violence – established the 'Community Alliance Rejecting the KPK Interim Law' (*Hukumonline* 2009h). Perhaps the most widely levelled criticism was that by filling Bibit and Chandra's positions, albeit temporarily, SBY had implicitly sanctioned the attacks on the KPK (Azly 2009). Some critics disputed that KPK vacancies were an emergency justifying the issuance of an interim law (*Hukumonline* 2009g). Others argued that the KPK Law already provided a process for the appointment of KPK commissioners which helped avoid undue influence, interference or pressure. Using procedures he himself established, the President could unilaterally appoint commissioners loyal to him rather than dedicated to corruption eradication (*Hukumonline* 2010s).

Although these criticisms have some merit, on balance they are difficult to sustain, for several reasons. First, with only two commissioners serving, the KPK was demoralised and paralysed. With Antasari on trial and Bibit and Chandra suspended, the KPK's ongoing investigations and prosecutions had ground to a halt. Bibit and Chandra had been largely responsible for the KPK's so-called 'repressive' (*represif)* activities: investigation and prosecution. The remaining commissioners, Mochammad Jasin and Haryono Umar, had been appointed to focus on corruption prevention, monitoring and information collection and distribution.

There was much debate about whether Bibit and Chandra should be replaced or whether the legal proceedings against them should be allowed to take their course. What was clear, however, was that, as the law then stood, either option would require around six months, during which the KPK would be in institutional limbo. As the Interim Law itself declared in its 'Considerations' section (a), the lack of KPK commissioners had 'impeded its performance and had the potential to endanger legal certainty in the KPK's efforts to prevent and eradicate corruption'.[3] This, Considerations section (b) continued, meant that, to 'ensure the continuity of efforts to prevent and eradicate corruption, filling the vacancies needed to be expedited.'

Second, though the Interim Law appeared to give the President power to unilaterally appoint commissioners, SBY in fact chose a team of well-respected figures to select them,[4] giving the appearance that the process was impartial and merit-based. There was certainly no doubt about the capacity or integrity of the temporary commissioners selected. Mas Achmad Santoso is a well-known reformist, legal expert on governance issues and senior advisor to international donors and the government; Tumpak Hatorangan Panggabean was a former KPK Commissioner (2003–2007) with a long career in public prosecution; and Waluyo had previously worked in the KPK as Deputy of Prevention.

Third, without the Interim Law, Article 33 would have required parliamentary approval of candidates. Given that some national parliamentarians were themselves under KPK investigation, the appointment process was likely to be highly fraught. As the Gultom case, discussed in Chapter 2, demonstrates, parliament-made appointments have been highly susceptible to manipulation and rent-seeking. It was possible that only candidates who pledged to drop KPK investigations into parliamentarians would receive the support of those parliamentarians and their parties and factions. Those parliamentarians might also have deliberately drawn out the selection process, thereby extending the KPK's institutional limbo.

Ultimately, when the national parliament next met in mid-March 2010, seven of its nine factions refused to ratify SBY's Interim Law. The Law no longer remains valid. The essence of parliament's rejection was that the Interim Law was no longer necessary – as we will see, by 2010 the President had already reinstated Bibit and Chandra.[5] The only two factions that endorsed it were the National Awakening Party and SBY's Democrat Party, both of which proclaimed that the Interim Law evidenced SBY's continuing commitment to the anti-corruption agenda.

The Constitutional Court's interim injunction

On 13 October 2009, one week after their replacement, Bibit and Chandra lodged a case with the Constitutional Court.[6] While at this time they had only been named as suspects and suspended, they anticipated that they would be permanently dismissed, under Article 32(1)(c) of the KPK Law, when their trial commenced. Article 32(1)(c) states:

> KPK leaders are to leave their positions or be removed from their positions if they become a defendant (*terdakwa*) in a criminal case.

The nub of their case was that Article 32(1)(c) contravened their constitutional rights to presumption of innocence and equality before the law. The dismissal would be, in effect, a punishment, imposed before their conviction. Indeed, they could be dismissed even if not ultimately convicted. All other state officials had the benefit of the doubt until convicted: when on trial they could be suspended, but not dismissed.

Bibit and Chandra sought from the Constitutional Court an interim injunction to prevent their dismissal before the court could hear their case, consider their arguments and come to a final decision. In particular, they sought orders preventing police from handing over the brief of evidence to prosecutors, prosecutors from taking the case to trial and SBY from dismissing Bibit and Chandra by Presidential Decision. Below, I analyse Bibit and Chandra's constitutional arguments, key evidence presented and the Constitutional Court's final decision handed down on 25 November 2009. The focus of the present discussion, however, is the Court's decision of 29 October 2009 to issue an injunction.

In its decision, the court observed that the Constitutional Court Law – the law establishing the court and governing its procedures[7] – does not grant the Constitutional Court power to issue interim injunctions in judicial review cases; rather, the Law only explicitly authorises it to issue interim orders in disputes between institutions of state. The court noted, too, that Article 58 of the Law – which states that all statutes the court reviews remain in force until the court declares them invalid – seems to preclude the court from ordering that ongoing legal process be stopped or delayed.[8]

However, the court reasoned that it could and should issue injunctions in some review cases. It found that it had power to regulate its own procedures and matters relating to the exercise of its jurisdiction. In fact, it had already done so by issuing Constitutional Court Regulation No 06/PMK/2005 on Procedural Guidelines in Judicial Review Cases. Article 16 of that Regulation, the court noted, explicitly permits it to stay cases or postpone decisions in some circumstances.[9]

The court also asserted that the community's 'sense of justice' required it to prevent the constitutional rights of citizens being breached.[10] An injunction could be awarded provided that it 'strengthened legal protection' and did not 'cause legal confusion'.[11] The court stated:

> The relevance and significance of issuing an injunction in a constitutional review case is to prevent the breach of human rights if a legal norm is applied while the application is still being heard, in circumstances in which the applicant's constitutional rights will not be able to be restored in the final decision. In this case, an injunction is required because of the potential constitutional damage suffered if the applicants are permanently dismissed by the President while the legal basis for the termination is being examined in this Court.[12]

After all, the court noted, as the only institution providing constitutional review, its function was not only to uphold the law, but also to 'preventatively protect' the constitutional rights of citizens.[13]

Having decided that it could issue an injunction, the court found that there was 'sufficient potential' for breach of several constitutional rights in this case, discussed below. As to whom its injunction would be directed, the court noted that it lacked jurisdiction to order police and prosecutors to postpone legal processes against the applicants.[14]

The court chose, instead, to focus on the President's power to dismiss KPK commissioners under Articles 32(1)(c) and 32(3) of the KPK Law. It ordered the President to refrain from using the administrative powers granted under those provisions to suspend Bibit and Chandra, pending the court's final decision.[15]

Bibit and Chandra's injunction in context

Appreciating the significance of the Constitutional Court awarding this injunction may require some context. In its eight-year history, this is the only injunction that the court has granted in a judicial review case. Many applicants in previous and subsequent cases have sought injunctions. The court has staunchly refused to issue them, however.

Before the Bibit and Chandra case, the court's response was simply that it lacked jurisdiction to award interim injunctions in judicial review cases, regardless of the irrevocability of potential damage to the applicant's constitutional rights. The following is an example of such a case. In 2007, Amrozi, Ali Ghufron and Imam Samudera – all convicted and sentenced to death for involvement in the Bali Bombings of 12 October 2002 – challenged the constitutionality of Law No 2/PNPS/1964 on the Method of Carrying out the Death Penalty (*Cara Pelaksanaan Pidana Mati*),[16] which proscribes death by firing squad. The primary question for the Constitutional Court was whether execution by firing squad constituted torture within the meaning of Article 28I of the Indonesian Constitution. Article 28I(1) states that the:

> right to life, the right to not be tortured, the right to freedom of thought and conscience, the right to religion, the right to not be enslaved, the right to be recognised as an individual before the law, and the right to not be prosecuted under a law of retrospective application are human rights that cannot be limited under any circumstances.

The applicants sought an injunction, arguing that the Law should not be applied against them – that is, they should not be executed – pending the Constitutional Court's decision in the case. Yet the court declined, declaring that the Constitutional Court Law did not allow it to order the injunction.[17] In the event, however, the court's refusal to issue an injunction was insignificant. The court held that the death penalty was constitutional, but the three applicants were not executed until well after the Constitutional Court's decision was handed down. The point is that the court decided that, while it was hearing the case, it had no power to prevent violation of the alleged right.

Since the Bibit and Chandra injunction, many more applicants have also sought injunctions. Examples abound, even in cases involving corruption suspects discussed in this and previous chapters. For instance, in mid-June 2010, Susno Duadji applied to the Constitutional Court for an interim injunction to prevent police from continuing to investigate him until the court had issued a final decision on his judicial review application.

The background to Susno's somewhat vexatious constitutional challenge is as follows. He had reported several people to police for corruption and had testified against them. Given his cooperation, Susno objected to police continuing to investigate him for involvement in those and other crimes (*Hukumonline* 2010i; *Hukumonline* 2010r). He sought a review of Article 10(2) of Law No 13 of 2006 on the Protection of Witnesses and Victims, which denies immunity to whistleblowers. A whistleblower can still be convicted of crimes about which he or she has testified, though courts can consider a whistleblower's contribution as a mitigating factor during sentencing. Susno's constitutional arguments verged on the spurious. They included that lack of immunity breached his rights to participate in law and government (Article 27(1) of the Constitution); his right to recognition, guarantees, protection and legal certainty (Article 28D(1)); and his rights to safety and protection from threat or fear (Article 28G(1)).

The Constitutional Court rejected Susno's request for an injunction, arguing, as it had done in the Bibit and Chandra case, that it had no jurisdiction over police investigations. The court also emphasised that it could only review abstract norms and provide decisions that are *erga omnes* (generally applicable to all). It could not make decisions relating to actual cases; nor could it review or prevent police investigations into the applicant or undo action already taken.

The court also rejected, on similar grounds, an application for an injunction brought by former Justice Minister Dr Yusril Ihza Mahendra, who was accused of involvement in the same online company registration scandal that ensnared Romli Atmasasmita. Mahendra's challenge, lodged with the Constitutional Court on 6 July 2010, centred upon Article 22(1)(d) of the Public Prosecution Law.[18] This Article sets out the grounds upon which the Attorney-General can be honourably discharged, including 'the expiry of his or her term of office'. Beyond this bare statement, the Law does not explain how the term might come to an end. Mahendra argued that the term of office of the Attorney-General should correspond with the term of office of the president who appointed him or her. SBY's first term ended on 20 October 2009. So too, should have Attorney-

General Hendarman Supandji's. Mahendra also claimed that after SBY's term expired, all of Supandji's acts performed as Attorney-General were invalid. This included, he argued, the decision to investigate him.

In its final decision, the Constitutional Court declared that Article 22(1)(d) caused enough legal uncertainty to require legislative redress. To this end, the Constitutional Court presented four alternatives to the legislature. The Attorney-General's term could end upon the expiry of the term of the president or cabinet; after a fixed period; upon the Attorney-General's retirement; or at the discretion of the president or the official that appointed the Attorney-General. In the interim, the Constitutional Court decided that Article 22(1)(d) would remain constitutional, conditional upon its interpretation in line with the first alternative.

Finding that Supandji had remained in office well beyond the expiry of SBY's first term, the Constitutional Court ordered him to step down, effective from the moment the Constitutional Court finished reading its decision in open court (*Hukumonline* 2010p; *Hukumonline* 2010q). SBY removed him from office two days after the ruling and appointed a new Attorney-General in early December 2010 (Aprianto and Wibowo 2010). The court made it clear, however, that its ruling had no bearing upon the prosecution's investigation into Mahendra. The investigation had already commenced and the Constitutional Court's decision was prospective: it could not undo any action taken before it was handed down. In any event, on the facts, the Attorney-General had not formally initiated the investigation into Mahendra's affairs.[19]

As for the injunction request, the Constitutional Court denied it, setting out almost verbatim the same grounds it employed in the Susno case – including that its decisions operated *erga omnes* and could not, therefore, have retrospective effect upon a concrete case.

Analysis

Legally, the Bibit and Chandra injunction does not sit comfortably with cases that came before and after it. It is difficult to escape the impression that the Constitutional Court treated Bibit and Chandra's injunction request as a special case. As mentioned, previously the court had flatly refused to issue interim injunctions in judicial review cases, declaring that it lacked jurisdiction to do so. This position it maintained even in the face of very serious and potentially irrevocable damage to the constitutional rights of the applicants, such as in the Bali Bombers case discussed above. It seems difficult to reconcile the court's injunction to prevent Bibit and Chandra's dismissal with its refusal to stay executions in the Bali Bombers case. Surely the latter case involved more serious and irrevocable damage: if the applicants were in fact to be tortured to death, then this could hardly be undone. By contrast, although likely to take time, reinstatements could be made and dismissals undone.

In cases subsequent to Bibit and Chandra's, the court has acknowledged that it now has power to issue interim injunctions. That the court has granted itself

this power is not, of itself, problematic. Without injunctions, the rationale for the Court having judicial review powers crumbles. If the court cannot prevent a statute from damaging constitutional rights pending its final decisions, those decisions will be of no use to applicants whose rights are irreparably damaged while the case is ongoing. Its function as guardian of the Constitution would become a nullity.

However, the court's subsequent refusal to issue injunctions in circumstances similar to those faced by Bibit and Chandra is problematic. Indeed, it is hard to see how the court can, in light of the Bibit and Chandra case, avoid issuing injunctions to applicants to prevent potential constitutional damage during the trial, once it grants standing to the applicant. Applicants have standing to lodge constitutional challenges with the Constitutional Court if the statute has damaged their constitutional rights or is likely to do so (Butt 2007a). If applicants are granted standing, their constitutional rights are in peril and an interim injunction should be awarded as a matter of course.

More fundamentally inconsistent, however, is the court's refusal to grant injunctions in the Susno and Yusril cases through fear of interfering in concrete cases. Surely the Court's interim order in the Bibit and Chandra case did precisely that: it directed the President to refrain from issuing a particular decision in respect of the applicants. It was not an order applicable to all citizens: it was an order solely geared towards protecting the constitutional rights of Bibit and Chandra.

It seems, then, that the Constitutional Court made an exception when it ordered Bibit and Chandra's injunction. In the conclusion to this chapter, I speculate on why the Constitutional Court might have done so.

'Team of Eight'

Meanwhile, public and media condemnation of the handling of the Bibit and Chandra case, and allegations that they were framed, had reached fever pitch. Again, SBY was forced to act. On 2 November 2009, he issued Presidential Decision No 31 of 2009 on the Establishment of an Independent Team to Verify Facts and Legal Processes in the Case of Mr Chandra M. Hamzah and Mr Bibit Samad Rianto. The so-called 'Team of Eight' comprised highly esteemed lawyers and public figures, including Chairperson Adnan Buyung Nasution (a high-profile Indonesian lawyer), Deputy Chairperson Koesparmono Irsan (former Deputy Chairman of the National Human Rights Commission (Komnas HAM)), Denny Indrayana (Presidential Legal Affairs Advisor), Todung Mulya Lubis (lawyer), Amir Syamsudin (Democrat Party politician and lawyer), Komaruddin Hidayat (Rector of Syarif Hidayatullah State Islamic University), Anies Baswedan (Rector of Paramadina University) and Hikmahanto Juwana (University of Indonesia Law Professor and former Dean of Law). The team was given 14 working days to investigate the case and the legal processes that had taken place. It was given power to coordinate with government agencies and to interview parties involved in the handling of the case. It was required to produce findings and recommendations.

However, the day after the team's establishment, just as it was beginning its investigations, the Constitutional Court reconvened to hear out Bibit and Chandra's constitutional challenge. Evidence presented in the Constitutional Court made it clear that Bibit and Chandra had been framed and changed the nature of the team's work. I will now discuss these Constitutional Court proceedings. I return, below, to the team's findings and recommendations.

Bibit and Chandra in the Constitutional Court: first full hearing

Having issued an interim injunction to prevent Bibit and Chandra's dismissal pending its final decision, the Constitutional Court returned for a full hearing of the case on 3 November 2009.[20] As mentioned, Bibit and Chandra objected to Article 32(1)(c) of the KPK Law under which they could be dismissed upon becoming defendants (*terdakwa*) – that is, as soon as their trials commenced.

When the case was lodged with the Constitutional Court, Articles 32(2) and 32(3) of the KPK Law had already been applied against Bibit and Chandra. Article 32(2) of the KPK Law states, 'If KPK leaders become suspects (*tersangka*) for a crime, they are to be suspended from office.' Article 32(3) requires that the president stipulate (*menetapkan*) the suspension and removal of KPK commissioners. SBY had fulfilled Article 32(3): as mentioned, he had issued Presidential Decision 74/P of 2009 to suspend Bibit and Chandra, which referred to them being charged with 'suspected corruption relating to the misuse of power or arbitrary use of power … [t]o issue a travel ban against Djoko Soegiarto Chandra and revoke that travel ban, and to issue a travel ban against Anggoro Widjojo…'[21]

Article 32(1)(c) had not, however, been applied against Bibit and Chandra: they had not yet been dismissed. Their strategy was to have Article 32(1)(c) struck down before it could be applied to dismiss them.

The main drama of the full hearing occurred well before the parties began making their constitutional arguments, however. Prior to the hearing, the court had ordered the KPK to hand over all recordings and transcripts connected with the Bibit and Chandra case. Expectations were high about their contents: the media had obtained and published transcripts several days beforehand, which seemed to reveal plans to frame Bibit and Chandra (Ramidi, Handayani *et al.* 2009). On the day the court reconvened to hear the case, Chief Justice Mahfud ordered the recordings to be played in open court.

Before they were aired, however, then-Minister for Law and Human Rights Patrialis Akbar, representing the government, questioned the relevance of the recordings to the case at hand. The court had already anticipated this question: its judges had already decided, during a Judges' Deliberation Meeting (*Rapat Permusyawaratan Hakim*), to allow these recordings to be played (Jurnal *Konstitusi* 2009). The court's answer was as follows. The recordings were relevant because the applicants had adduced them as evidence to support their constitutional arguments. Indonesian law stipulates that trials must be open to the

public,[22] and that applications be accompanied by supporting evidence.[23] Failure to observe these provisions results in any ensuing judicial decision being invalid.[24] The court concluded:

> In light of these provisions, and the Constitutional Court's position as an independent judicial body upholding the law and justice, playing the recordings on the compact discs is relevant to the case at hand.[25]

With respect, the reasoning underlying the Constitutional Court's decision to admit the recordings was entirely unconvincing, and it is critiqued below.

The recordings were then played in open court, broadcast live on national television and streamed over the internet. They comprised around 270 minutes of wiretapped conversations between suspects the KPK was investigating for corruption and some of Indonesia's most senior law enforcement officials. Featuring prominently were conversations between Anggodo, his brother Anggoro, officials from the Witnesses and Victims Protection Agency, and high-ranking police and prosecutors. Voices identified on the tape included then-Deputy Attorney-General Abdul Hakim Ritonga, former Head of Intelligence at the Attorney-General's Office Wisnu Subroto, and National Chief of Police Detectives Susno Duadji.

The conversations revealed plans to fabricate the case against Bibit and Chandra and thereby to curtail the KPK's activities. They disclosed that Anggodo had 'directed' the testimony of witnesses to match the 'facts' the police had fabricated (Dhyatmika, Hadad *et al.* 2009). Further, they implicated Anggodo in a conspiracy to murder Chandra once he was taken into police custody. This plot, according to the recordings, had the backing of 'Truno III', widely considered a reference to National Police headquarters, located on Trunojoyo III Street, South Jakarta (Pasandaran 2009). Some recordings even referred to 'RI1' – generally thought to mean 'Republic of Indonesia Number 1': the President. Ultimately, however, SBY denied being part of the plot and claimed that unnamed figures were attempting to discredit him (Haryadi 2009).

After hearing the recordings, the Constitutional Court unanimously declared that Bibit and Chandra had been framed, and decided that they should be immediately freed and reinstated as KPK commissioners. Bibit and Chandra were released from detention not long after midnight the following day, 4 November 2009 (Christanto 2009).

Team of Eight: findings and recommendations[26]

Two weeks later, on 16 November 2009, the team issued its final report.[27] It had interviewed individuals allegedly involved in the saga, including Bibit, Chandra, Anggodo, Susno, Ari Muladi, Antasari, Ritonga and Iriawan. It had also visited institutions such as police, prosecutors, the KPK and civil society groups, as well as senior journalists. The team concluded that, initially, police had rightly investigated the allegations of bribery and extortion made against Bibit and Chandra.

The allegations appeared to be supported by the police statements of Antasari, Anggoro, Anggodo and Ari Muladi, and the recorded conversation between Antasari and Anggoro in Singapore.

However, Team Eight found that, as police investigations proceeded, police discovered no evidence of bribery or blackmail on the part of Bibit and Chandra, or of Ari Muladi transferring money to a KPK official. Nevertheless, according to Team Eight, police subsequently 'forced the allegation' (*memaksaan dugaan*) that Bibit and Chandra had misused their authority, pointing to travel bans on Anggoro and Tjandra. Team Eight discredited the choice of charges, too, using the following arguments. First, the KPK has, under Article 12(1)(b) of the KPK Law, clear discretionary powers to issue and lift travel bans against suspects in corruption cases. Issuing such a ban could not, therefore, constitute misuse of power. Second, Article 25(2) of the KPK Law gives KPK commissioners power to regulate the KPK's procedures and policies. Using this provision, the KPK had developed a practice under which the KPK commissioner handling a case could issue or revoke travel bans without seeking prior approval of the other commissioners. Third, no evidence indicated that Bibit and Chandra had forced immigration officials to prevent Anggoro going overseas or threatened immigration officials to revoke the travel ban on Tjandra. There had, therefore, been no misuse of power in this coercive sense. Finally, the travel bans were issued with good cause: Anggoro was being investigated for bribing Yusuf Erwin Faisal, and Joko Tjandra for bribing prosecutor Urip Tri Gunawan. At trial, Joko was found not to be involved, so his travel ban was revoked.

According to the Team of Eight, continuing the case against Bibit and Chandra indicated that:

> The professionalism of police investigators and prosecutors is extremely weak because the allegations and charges were not supported by strong facts and evidence. The phenomena of following 'whatever my superiors desire' amongst investigators and prosecutors is still strong and, as a result, they are not independent in developing their findings with objectivity and justice. This leads to the impression that there was engineering. The emergence of instructions from one's superiors relates to the conflict of interest of that superior…
>
> (*Kompas* 2009d)

Team Eight did not lay blame solely upon police and prosecutors, however.

> During Team Eight's verification process, strong suspicions of case brokering[28] were found, not only amongst police, prosecutors and advocates, but also the KPK and the Witness and Victim Protection Agency. In other cases, the legal mafia has reached notaries and the courts.
>
> Team Eight also found institutional and personal problems within the police, prosecution, KPK and Witness and Victim Protection Agency. This resulted in disharmony and ineffectiveness in performing their functions.
>
> (*Kompas* 2009d)

The team urged the government to establish a National Commission to comprehensively overhaul these institutions after having an independent body conduct diagnostic 'governance audits' to identify fundamental problems. It declared that the President must, as a priority, eradicate case brokering, beginning with Anggodo and Ari Muladi.

The team recommended that Ritonga and Susno resign, and that the case against Bibit and Chandra be dropped (Dwidjo and Setyarso 2009). Specifically, the team recommended that police issue an SP3 and the prosecution a SKPP. As mentioned in Chapter 1, police can issue SP3s to formally drop an investigation because of insufficient evidence; because the alleged criminal act was not, in fact, a crime; or for some other legal reason.[29] Prosecutors can issue a SKPP – a formal declaration of intent to drop a prosecution – upon the same grounds.[30] If SP3s and SKPPs were issued, however, the case against Bibit and Chandra could be reopened if new evidence were uncovered.

Team Eight canvassed another option for prosecutors: to '*deponir*' the case – that is, to close it in the public interest.[31] Under this option, after seeking and considering the opinions of relevant institutions, prosecutors can permanently drop a case, even if sufficient evidence exists to continue to trial. Implicit in *deponering* is that there may well have been a case against the accused, but the public interest demands that prosecutors not proceed.

Some of the key Team Eight recommendations were quickly acted upon. Within weeks of the release of its report, the Attorney-General issued an SKPP formally dropping the prosecution and, soon thereafter, the President reinstated Bibit and Chandra to their positions in the KPK (Komisi Pemberantasan Korupsi 2009b: 6).[32] Ritonga and Susno resigned. (Team Eight's calls for institutional diagnostics and reforms have, however, been ignored.) But this was not the end of the matter. In early 2010, Anggoro successfully challenged the basis, mentioned in Bibit and Chandra's SKPP, for dropping the prosecution. I discuss this challenge and its ramifications near the end of this chapter.

Back to the Constitutional Court: Bibit and Chandra's arguments

Meanwhile, the Constitutional Court had been hearing Bibit and Chandra's legal arguments to support their constitutional challenge against Article 32(1)(c) of the KPK Law. Bibit and Chandra had raised three primary arguments for its invalidity. The first was that Indonesia's Constitution gave citizens the right to be presumed innocent until proven guilty and that Article 32(1)(c) breached that right. From the outset it seemed that their primary hurdle would be establishing that the Constitution did, in fact, give citizens this right. The Constitution does not explicitly mention it. Bibit and Chandra, therefore, needed to convince the Court that the presumption could somehow be implied into the Constitution.

To this end, Bibit and Chandra argued that Article 28D(1) of the Constitution encompassed the presumption of innocence. Article 28D(1) states:

> Each person has the right to the recognition, guarantees, protection and certainty of the law which is just, and to equal treatment before the law.

They argued that the presumption of innocence was one such legal guarantee or protection, because it was a well-established domestic and universal legal principle. As for domestic law, they referred to the 2004 Judiciary Law and the Criminal Code, which states:

> every person suspected, arrested, detained, prosecuted and brought before a court, must be considered innocent until a binding judicial decision declares his or her guilt.
>
> (Part 3(c)(a), General Elucidation)

As for international sources of the presumption, Bibit and Chandra cited the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which Indonesia ratified by Law No 12 of 2005.

Article 32(1)(c), they argued, embodied a presumption of guilt because KPK leaders could be 'punished' through dismissal, just by being named as defendants. They could be dismissed even before being found guilty of an offence – indeed, even if they were never found guilty of an offence. According to the applicants, in light of the presumption of innocence, a more proportional approach would be to suspend KPK commissioners who are brought to trial.[33]

Bibit and Chandra's second argument was that Article 32(1)(c) did not provide equality before the law. To support this argument, they referred again to Article 28D(1), set out above, which includes the right. They also pointed to Article 27(1):

> All citizens are equal before the law and in governance and must uphold the law and governance without exception.

In their application, Bibit and Chandra listed the dismissal procedures for officials from other high-level state commissions, bodies and institutions. These included constitutional court judges, national audit board members, national human rights commission members, judicial commission members, police, prosecutors, ordinary judges, Bank Indonesia bureaucrats, and ministers. Bibit and Chandra pointed out that these officials were accorded the presumption of innocence – they could be suspended if they faced trial, but could not be dismissed unless convicted. By contrast, KPK commissioners could be dismissed before conviction. KPK commissioners were, they argued, not accorded legal equality.

Finally, Bibit and Chandra argued that Article 32(1)(c) threatened the KPK's independence, particularly from the executive. The KPK was charged with supervising the executive, yet Article 32(1)(c) allowed the executive to dismiss KPK commissioners. (Bibit and Chandra could probably have raised a similar argument about police and prosecutors, who have power to investigate and bring KPK commissioners to trial, thereby resulting in their dismissal. Conceivably,

they might have argued, this could interfere with the KPK's independence, particularly when handling cases involving police and prosecutors.)

In response, the government countered that the dismissal provisions, including Article 32(1)(c) were, in fact, designed to protect the KPK. The provisions helped the KPK to maintain a clean image and integrity. They also benefitted KPK commissioners themselves who, relieved of their official duties, could concentrate on defending the criminal allegations levelled against them. Finally, the government sought to justify any discrimination in the Law, claiming that the KPK's 'extraordinary' law enforcement powers necessitated extraordinary 'models of punishment' for their misuse.

The Constitutional Court decision

Recognition, guarantees, protection and certainty of just laws

The court addressed Bibit and Chandra's argument that Article 32(1)(c) breached their constitutional rights to recognition, guarantees, protection and certainty of just laws as follows. First, the court declared that these rights were universal, citing various international instruments,[34] and Article 18(1) of Indonesia's Human Rights Law, which states:

> Every person arrested, detained and prosecuted for committing a crime has the right to be presumed innocent until legally proved guilty in court after being given every legal guarantee necessary for his or her defence in accordance with the law.

Second, the court observed that due process of law is a fundamental Indonesian constitutional guarantee. It requires that all legal processes are fair: people must be informed of legal processes against them and have the right to be heard before their rights, freedoms and property are taken away.[35] In particular, due process of law and the presumption of innocence are primary principles of Indonesia's democratic *negara hukum* (literally, 'law state', commonly translated as 'rule of law'). Indonesia is explicitly declared to be a *negara hukum* in Article 1(3) of the Constitution.

The court emphasised that the presumption of innocence was a principle of Indonesian law, pointing to the same provisions of domestic law as had the applicants. The court continued:

> The principle is recognised as a human right that must be protected. Implicitly, this right is recognised and can be constructed as a part of human rights and constitutional rights … and must, therefore, be respected, protected and effectively fulfilled. Law No 30 of 2002, though 'specially made', cannot contain a norm that has the potential to negate the human right to the protection of oneself, family, honour and dignity that is guaranteed by the Constitution.

Having determined that the presumption of innocence was a constitutional principle, the court turned to whether Article 32(1)(c) breached it. The court found that this provision imposed a sanction without trial and exposed the applicants' constitutional rights to arbitrary state action, including by police, prosecutors and judges. On the other hand, suspension for KPK commissioners who became defendants was appropriate: it achieved a balance between ensuring KPK's reputation and the rights of KPK commissioners.

Equality before the law

The court then considered Bibit and Chandra's argument that dismissal without conviction breached their rights to equality before the law. The court agreed, holding that Article 32(1)(c) discriminated against KPK commissioners: ordinary citizens and other officials enjoyed the presumption of innocence, but KPK commissioners did not.

The court disagreed with the government's attempt to justify Article 32(1)(c)'s 'extraordinary' punishment by reference to the KPK's extraordinary powers, though it did agree that KPK officials found guilty of corruption should face higher penalties. The court pointed out, however, that the KPK Law already provided this: KPK employees convicted of corruption have their punishments increased by one third of the standard punishment (Article 67).

KPK independence compromised?

The court rejected the argument that Article 32(1)(c) would compromise the KPK's independence by making it susceptible to executive interference. The court declared that, in its opinion, the KPK needed independence when exercising its functions and powers, but not in the appointment and dismissal of its commissioners. These were administrative issues over which, the court accepted, the influence of other institutions was inevitable.

Significantly, the court did not note, as perhaps it could have, that Bibit and Chandra's independence argument was not, in fact, based on the Constitution. The Constitution does not mention the KPK, let alone require that it be independent. Rather, only the KPK Law, in Article 3, provides for the KPK's independence. With this argument, then, Bibit and Chandra were really asking the court to consider whether Article 3 trumped Article 32(1)(c). Strictly speaking, this is a matter of ordinary statutory interpretation over which the Constitutional Court lacks jurisdiction (Butt 2007a).

Final holding

Despite upholding most of the applicants' arguments, the court refused to simply invalidate Article 32(1)(c), because, it said, doing so would create a legal vacuum. Instead, the court declared Article 32(1)(c) 'conditionally unconstitu-

tional' (*bertentangan dengan UUD 1945 secara bersyarat*) – that is, unconstitutional unless given the following meaning:

> KPK leaders can be dismissed permanently only after they have had been found *guilty* of a crime by court decision that is binding [my emphasis].[36]

Critique

The Constitutional Court's decision in the Bibit and Chandra case was publicly popular and drew praise from anti-corruption advocates. From a legal perspective, however, it is largely unpersuasive. This section critiques three aspects of the court's decision: admitting the wiretapped conversations; deciding that the presumption of innocence was implicit within the Constitution; and declaring Article 32(1)(c) conditionally unconstitutional, rather than simply invalidating it.

Relevance of playing the recordings

Legally, there is no justification for the court allowing the recordings to be played, regardless of their content. Evidence indicating that Bibit and Chandra were framed would certainly have been relevant in the criminal proceedings against them because it may have helped prove their innocence. The recordings were entirely irrelevant, however, to the primary 'live' issues before the Constitutional Court: whether the Constitution provided the presumption of innocence and, if so, whether Article 32(1)(c) of the KPK Law contravened it.

The court gave two main reasons, both unconvincing, for allowing the recordings. First, as mentioned, it pointed to legislation requiring that trials be open to the public and that applications be accompanied by supporting evidence.[37] These provisions hardly justified the recordings being played, however. The court's proceedings were open – indeed, the court had facilitated wider access by allowing proceedings to be televised and streamed. Whether the recordings were played did not affect the public's ability to witness the court's proceedings. And, while applicants certainly must support their constitutional challenges with evidence, surely that evidence must be relevant to their constitutional arguments.

The second reason the court gave was as follows. In two previous cases it had declared that applicants did not need to show *actual* damage to their constitutional rights in order to have standing to bring a judicial review application.[38] Rather, the court had deemed potential damage to be sufficient. Listening to the contents of the recording, the court claimed, would allow it to evaluate whether Article 32(1)(c) could potentially breach the applicants' constitutional rights if, in fact, they were framed.[39] In the event, of course, the recordings indicated that the case against Bibit and Chandra had been engineered. Article 32(1)(c) did, therefore, have potential to breach the constitutional rights of the applicants and any future KPK applicants:

> If, for example, a court found the applicants guilty, then irrespective of the decision of that court, according to the Constitutional Court, Article 32(1)(c) of the KPK law has the potential to breach the constitutional rights of KPK commissioners. Therefore the argument of the applicant that the provision in dispute could become a tool for engineering has legal foundation.[40]

This reasoning about 'potential' breach is, with respect, wholly inconsistent with the court's previous cases. Article 51(1) of the Constitutional Court Law, which deals with applicants' standing to bring a constitutional challenge before the court, requires that applicants 'consider' (*menganggap*) that a statute damages their constitutional rights. The court has interpreted this as indicating that damage need not have yet occurred. In its very first case – the *Electricity Law* case (2003) – the Constitutional Court confirmed this interpretation.

> According to Article 51(1) of the Constitutional Court Law, it is sufficient if the damage to the constitutional right remains to be proved at the time the case is being argued. The damage to constitutional rights does not always need to be actual, but can be potential.[41]

Similarly, in the *Broadcasting Law* case – another early case – the Constitutional Court stated that an application could be lodged without needing to 'wait for a victim to fall as a result of the Law'.[42]

In the Bibit and Chandra case, however, the court contorted the line of 'potential damage' cases. Surely, the fact that Bibit and Chandra were KPK commissioners and that they faced dismissal was sufficient to meet the 'potential damage' test: as commissioners, there was potential that Article 31(2)(c) might be applied against them. Evidence showing that they had been framed was entirely irrelevant to this enquiry.

Finally, the court did very little to assess whether the recordings were, in fact, reliable. It simply declared that they were authentic because they were in a sealed envelope and the KPK gave them to the court directly.[43] According to the court,

> all recordings formally adduced by the KPK such as those used in the ACC should be accepted as evidence which is true because the recording has been officially made and can be justified by law.[44]

In an interview with *Tempo* magazine, Constitutional Court Chief Justice Mahfud said that whilst formal authentication was necessary in criminal cases, in constitutional cases the standard for admissibility was lower: because no one was on trial 'there was no need for detailed evidence' (*Tempo English Edition* 2009a).

To the knowledge of the author, no witnesses, such as the person or persons who made the recordings, were called to authenticate them. Even though the authenticity of the recordings was not disputed inside or outside of court, the court's blind reliance tends to further taint its decision to allow them.

Implying rights

The process by which the court 'found' the presumption of innocence within the Constitution is also questionable, though less so than other aspects of its decision discussed in this section. An objection to the court's approach is that the presumption of innocence is not mentioned in the Constitution. (One might have thought that, given its purported importance, the presumption should have been explicitly included in the large catalogue of human rights inserted into the Constitution in 2000.) Although the court did not specifically address this argument, its reasoning implicitly rejected it. The court identified two main constitutional sources for the presumption of innocence: first, the right to recognition, guarantees, protection and certainty of just laws (Article 28D(1) of the Constitution); and second, the *negara hukum*, or rule of law (Article 1(3) of the Constitution).

Only the first source is discussed here.[45] The court's reasoning appeared to be as follows. The presumption of innocence is a domestic and universal legal principle because it is affirmed in many Indonesian statutes and international instruments. It is, therefore, incorporated into the Constitution because it is one of the legal guarantees or protections to which Article 28D(1) refers.[46]

However, this interpretation seems misguided. Though the court mentioned that the presumption of innocence was a domestic and universal principle, it did not explicitly require that, in order to be justiciable under Article 28D(1), a right or guarantee needed to be recognised under both national and international law. It is, therefore, unclear whether *any* legal right or protection contained in any type of Indonesian law – whether parliamentary or executive – could be elevated to constitutional status and, therefore, become enforceable by the Constitutional Court. If so, then given that most Indonesian laws provide legal rights, the likely effect would be an exponential expansion of the Bill of Rights, risking swamping the court with applications.

Final holding: 'conditional unconstitutionality'

In several decisions, the court has decided that a law is 'conditionally constitutional' – that is, that it is constitutional and can stay 'on the books', provided that it is implemented in a way which the court thinks is constitutional. For example, in the *Sisa Suara* case (2009),[47] the court found the statute under review to be so unclear as to fall foul of the constitutional requirement of 'legal certainty'. The court, however, found it constitutional, on the condition that it be interpreted in the way the court specified (Butt 2009a). In the *Water Resources Law* case,[48] the court was concerned that the statute under review relinquished state control over water resources, thereby breaching Article 33 of the Constitution, but would not invalidate the statute, provided that the government issued implementing regulations that were consistent with the Constitution. In the *Film Censorship* case,[49] the court was asked to assess whether a law that allowed film censorship breached the constitutional right to free speech. The court criticised the law for lagging behind the times, but nevertheless declared the law to be

conditionally constitutional – that is, constitutional provided that the censorship board implemented the law in line with democratic principles and freedom of expression.

These types of decisions raise significant questions about the court and its role. On the one hand, as discussed in Chapter 3, the Constitution requires the court to ensure that the national parliament follows the Constitution. When parliament fails to do so, but the court chooses not to intervene, then the court seems to be failing to perform this task. The court is allowing laws to continue in force which, the court has determined, are beyond the parliament's lawmaking power. On one view, then, the Constitutional Court, charged with enforcing the Constitution, is itself breaching it. Significant too is that the Constitutional Court cannot ensure that the government implements the impugned statute in the way the court instructs. As mentioned in Chapter 3, the Constitutional Court's review jurisdiction is limited to assessing whether statutes comply with the Constitution; it lacks jurisdiction to review implementing regulations.

On the other hand, these types of decisions show that the court is aware that its function is political and that it has very little at its disposal to force government compliance, even with the decisions in which the court invalidates statutes. The court must, therefore, be seen to compromise in all but the most serious and blatant breaches of constitutional rights lest it be ignored altogether. It is arguable that these 'conditional constitutionality' decisions – which are not 'zero-sum' – at once show a deference and a concern to minimise disruption to the government and legislature, whilst ensuring that constitutionally problematic laws do not escape entirely unheeded (Butt 2009a).

The conditionally constitutional decisions also appear to be inconsistent with some of the court's previous cases in which it has refused applicants' requests to amend statutes to remedy perceived constitutional defects. For example, in one case,[50] the applicant asked the Constitutional Court to amend the Religious Courts Law to grant the religious courts jurisdiction to enforce the corpus of classical Islamic law, including criminal law, not just aspects of family and economic law (Butt 2010). The applicant argued that this was required to fulfil his constitutional right to freedom of religion. In this and other cases, the court has pointed out that it is a 'negative legislator' – it can only invalidate unconstitutional legislation. The court cannot usurp parliament's role as 'positive legislator' by redrafting legislation in order to make it constitutional or by adding norms. Yet, when it imposes conditional constitutionality, the court seems to be doing just that. By imposing its favoured interpretation of the law, it is, in effect, making de facto change to the law.

Anggodo's last stand

By 2010, it seemed that the Bibit and Chandra saga had run its course. Prosecutors had issued a SKPP ceasing their investigation,[51] the Constitutional Court and the Team of Eight had declared that Bibit and Chandra had been framed, and the President had reinstated them.

The saga was far from over, however. As it had been unfolding, Anggodo was awaiting trial before the Jakarta ACC for attempting to bribe, through Ari Muladi, KPK commissioners to drop an investigation into his brother, Anggoro, as discussed above. Ultimately, Anggodo was convicted under Article 15 of the 1999 Anti-Corruption Law for conspiracy to commit corruption and sentenced to four years' imprisonment (Rayda 2010a). However, before his trial, he lodged a pre-trial motion (*praperadilan*) before the South Jakarta District Court.

Article 77 of the Code of Criminal Procedure gives the general courts jurisdiction in a pre-trial hearing to review the dropping of investigations and prosecutions. Such applications can be brought by 'interested third parties' (Article 80 of the Code of Criminal Procedure). Unlike most other judicial proceedings, which are presided over by a three-judge panel, *praperadilan* are heard by a sole judge (Article 78(2)). If the judge decides that the cessation of investigation or prosecution was invalid, then the investigation or prosecution must (*wajib*) proceed (Article 82(3)(b)).

Usually, the 'interested third parties' who are granted standing to bring *praperadilan* proceedings on these grounds are victims and witnesses. Judge Setyadi, however, granted standing to Anggodo, deciding that because he had been charged with attempting to bribe Bibit and Chandra, he had a legitimate interest in the Bibit and Chandra case (*Hukumonline* 2010f). In these proceedings Anggodo argued that Bibit and Chandra's SKPPs were invalid because they did not meet any of the grounds upon which prosecutors can issue a SKPP. As mentioned, these grounds, contained in Article 140(2)(a) of the Code of Criminal Procedure, are: insufficient evidence; no criminal act occurred; and a particular legal reason requiring the case to be closed (usually defined as the defendant's death, double jeopardy and the expiry of a limitation period for bringing proceedings) (Harahap 2000).

Bibit and Chandra's SKPP had cited none of these grounds. At a press conference after the SKPPs were issued, Deputy Attorney-General for Special Crimes Marwan Effendy mentioned three reasons for dropping the cases. First, he cited what he called a juridical (*yuridis*) reason: although Bibit and Chandra's actions had breached Articles 12(e) and 23 of the Anti-Corruption Law, prosecutors thought Bibit and Chandra could be excused because they were 'unaware of the consequences of their actions'. Apparently to justify this conclusion, Effendy added that Article 50 of the Criminal Code states: 'Whoever performs an act in observance of a statute is not to be subject to criminal proceedings'.

The second category of reasons Effendy cited were 'sociological' (*sosiologis*). There was, Effendy declared:

> an inner sense (*suasana kebatinan*) that had developed, making it inappropriate to bring Bibit and Chandra to trial because doing so would bring more disadvantages than advantages. [Further, dropping the case would] ensure the integration/harmony of law enforcement institutions (prosecutors, police and the KPK) in performing their tasks in the anti-corruption agenda.
>
> (*Hukumonline* 2009i; Isra 2010)

Third, Effendy claimed that:

> the community did not think that Bibit and Chandra should be held responsible for what they had done. Their actions were performed within the context of performing their tasks to eradicate corruption, which required legal breakthroughs.
>
> (*Hukumonline* 2009i; Isra 2010)

Lack of valid grounds was not the only deficiency of the SKPPs, however. Anggoro also argued that sufficient evidence had, in fact, existed to proceed against Bibit and Chandra. As mentioned, prosecutors had declared Bibit and Chandra's cases 'P21' and were ready to proceed to trial (*Hukumonline* 2010e).

Judge Setyadi agreed and invalidated the SKPPs on 20 April 2010.[52] Bibit and Chandra appealed to the Jakarta High Court and the Supreme Court, but were unsuccessful (*Hukumonline* 2010s).[53] It was generally thought that prosecutors would, therefore, need to bring Bibit and Chandra to trial. After all, as mentioned, Article 82(3)(b) of the Code of Criminal Procedure states that if, in *pra-peradilan* proceedings, the judge decides that the SKPP was invalid, then the investigation or prosecution must proceed.

Several commentators – some of whom were vocal supporters of Bibit, Chandra and the KPK – claimed that forcing the Bibit and Chandra case to trial was, in fact, desirable (*Jakarta Post* 2010d). A trial would give them the opportunity to publicly prove their innocence and perhaps even expose more details about the fabrication of the case against them. However, putting their fate in the hands of ordinary judges would be a risky strategy. If the Antasari case is representative, Bibit and Chandra might have been convicted by unconvincing evidence, and perhaps even in the face of exculpatory evidence. Many judges in Indonesia's general courts have a stake in a weakened KPK, given the likelihood that the KPK will eventually turn its attention to judicial corruption.

Eventually, however, in October 2010, more than six months after the SKPPs, prosecutors issued a *deponering* notice, indicating that the case should be dropped in the greater public interest of safeguarding the fight against corruption (Ramidi and Savitri 2009). As discussed above, this solution was proposed by the Team of Eight. As with a SKPP, this option had its drawbacks, however. In particular, it implied that Bibit and Chandra were guilty, or at least that enough evidence existed to try them, but that the greater public interest outweighed the need to pursue them. For prosecutors, *deponering* allowed them to avoid admitting fabrication or other wrongdoing; they could still maintain that they could have taken Bibit and Chandra to trial and won.

Conclusions

With three commissioners gone and most of its cases stalled, the KPK appeared doomed, despite overwhelming public support. As the Bibit and Chandra saga unfolded from mid-2009, however, the KPK attracted two key allies: SBY and

the Constitutional Court. Though SBY had previously been publicly ambivalent towards the KPK and many thought his Interim Law favoured police and prosecutors, this chapter has shown that his support for the KPK was critical to its survival. Without SBY's Interim Law, the KPK would not have been able to quickly resume its core investigation and prosecution functions. SBY's Team of Eight carefully investigated and then discredited the evidence that police and prosecutors had obtained against Bibit and Chandra. It offered very credible legal support to claims, confirmed in the Constitutional Court, that Bibit and Chandra had been framed.

Yet I argue that the Constitutional Court has ultimately lent the KPK – and, with it, the broader anti-corruption movement – the greatest support. In Chapter 3, I described the first few constitutional challenges to Indonesia's laws relating to corruption and observed that the Constitutional Court walked a fine line between upholding the constitution and the rule of law – its primary mandate – and supporting the anti-corruption movement. In the Bibit and Chandra case, however, the court arguably favoured supporting the anti-corruption movement at the expense of the rule of law.

As this chapter has shown, from a legal perspective, there is very little to commend three aspects of the Constitutional Court's decision. First, the wiretapped recordings were irrelevant to Bibit's and Chandra's constitutional challenge. Nevertheless, the court ordered that they be played, thereby providing a public forum to confirm suspicions that Bibit and Chandra had been framed. Second, the court issued an injunction to prevent Bibit and Chandra being dismissed while it was still hearing the case, despite previously claiming it lacked the power to issue them and also refusing to issue them in similar subsequent cases. And, finally, while implying rights into the Constitution is arguably desirable and necessary and something the Constitutional Court has done for many years, it implied the presumption of innocence without convincing explanation.

In light of these legal shortcomings, it seems that the Constitutional Court has gone out of its way – and has perhaps not followed the letter of the law – to assist Bibit and Chandra. It is possible to speculate as to why the court has done so. One reason might be that the court, which in previous decisions had emphasised the deleterious effects of corruption and the importance of eradicating it, genuinely wished to assist an embattled and well-intentioned KPK. As discussed in Chapter 3, the court hinted in the *KPKPN* case that the state had a constitutional obligation to protect citizens from corruption. The KPK has had more success in meeting that obligation than any other Indonesian institution, as Chapter 2 showed. As a high-level institution of state, the court might have rationalised its decision in the Bibit and Chandra case as a necessary evil to help the KPK – indeed, the state – fulfil that obligation.

Another reason for its willingness to help Bibit and Chandra may be the court's sensitivity to public perceptions, not only about apparent police and prosecutor impropriety in the Bibit and Chandra case, but also about how the Court itself responded to it. By early November 2009, when the court began its first full hearing, transcripts of some of the wiretapped recordings had been leaked to

the media and public support for the 'Cicak' movement appeared to be extremely high. On Facebook alone Bibit and Chandra had attracted more than one million followers. In this context, refusing to play them was not a realistic option. On the one hand, if Bibit and Chandra had sought permission to play the recordings and the court had refused, it was likely to be labelled part of the conspiracy even though most indications are that it was not. Refusal to play the recordings or even to uphold Bibit and Chandra's challenge might also have led to the court being likened to other Indonesian courts. The Constitutional Court has always been concerned to distance itself from Indonesia's other courts, particularly the Supreme Court and the general courts below it. This is understandable: not only do those courts perform very different functions to the Constitutional Court, they are also regularly and credibly criticised for corruption and incompetence, as discussed in Chapter 1.

On the other hand, deciding in favour of Bibit and Chandra was a publicity boon for the court. Millions of Indonesians witnessed the court's proceedings in which the wiretaps were aired. In the aftermath, popular support for Bibit and Chandra, the KPK and the Constitutional Court appeared to surge. Indeed, the court has been subjected to very little, if any, criticism for its decisions, both interim and final. After the court had allowed the recordings to be played, Mahfud claimed that he received so many congratulations that his mobile phone began malfunctioning (*Tempo English Edition* 2009a).

In this context, perhaps the court's decision, at least to allow the recording to be played, is best seen as part of its concern to maintain a reputation as an accessible forum in which public law issues are openly explored and grievances between citizens and the government are aired. It is, in fact, arguable that this has become one of the court's primary contributions to Indonesian public life. After all, it turns down most judicial review applications, and has, over time, arguably become less inclined to strike down statutes with which it finds constitutional fault (Butt 2009a). Instead, it seems to have begun preferring declarations of conditional constitutionality and other strategies, such as imposing deadlines upon parliament to remedy constitutional defects (as in the *ACC* case, discussed in Chapter 3). Further, to the extent that cases such as Bibit and Chandra's increase public support for the Constitutional Court, the court might anticipate greater adherence to its decisions amongst public institutions. In this context, it is relevant to reiterate that the Constitutional Court relies on government respect and goodwill for compliance with its decisions; it has no formal powers to enforce them.

As mentioned, the Constitutional Court decisions, along with the Team of Eight recommendations, forced senior police and prosecutors to resign, prosecutors to drop the case, and then in the face of Anggodo's attempts to revive the saga, to issue a stay on prosecution in the public interest.

However, this chapter has also shown that in the face of strong exculpatory evidence – dramatically exposed via the Constitutional Court and reported by the Team of Eight – prosecutors stubbornly refused to admit wrongdoing. Even the 'juridical' and 'sociological' grounds mentioned in the SKPPs and the

deponiring maintained that Bibit and Chandra had committed the crimes for which they were charged, even though, of course, they were never tried for those crimes, let alone convicted. Until mid-2010, police maintained that, despite formally dropping the case, they still held credible evidence of Bibit and Chandra's guilt: namely, the 64 recordings of telephone conversations between Ari Muladi and KPK Deputy for Enforcement Ade Raharja, mentioned earlier in this chapter.

However, during the 2010 trial of Anggodo Widjojo in the ACC, it emerged that police and prosecutors did not possess these recordings. The court repeatedly ordered the police to produce the recordings so that they could be assessed as evidence.[54] Yet police and prosecutors were unable to do so, despite continuing to maintain that they had the recordings. After much prevarication, Police Commissioner Farman, who handled the Bibit and Chandra investigation, testified that no such recordings existed (Chalid *et al.* 2010: 7). Rather, he claimed that police possessed call data records indicating that 64 calls had been made between the phones of Muladi and Rahardja, but no recordings of conversations between them. However, police could not even produce these records before the court. Eventually, Farman admitted that the call data records police possessed were not between Muladi and Ade Rahadja, but rather between Muladi and someone with the initials 'ES' (Chalid *et al.* 2010: 8, 11). These records, police claimed, could not be brought before the court because they were not relevant to the case against Bibit and Chandra.

Unfortunately, this does not bode well for the future of the KPK and the anti-corruption movement. It shows that existing law institutions, despite mass public ridicule and exposure of their transgressions, are likely to remain highly resistant to attempts to increase their transparency and accountability. It shows also that institutional rivalry between the KPK, police and prosecutors is likely to continue into the foreseeable future.

Conclusion

An uncertain future

In this final chapter, I assess whether, in light of the attacks aimed at weakening the KPK and ACC described in this book, the institutions will, in the foreseeable future at least, be likely to continue conducting successful corruption investigations, prosecutions and trials. I focus upon the implications of the ACCL, enacted in late 2009 in response to the Constitutional Court's decision in the *ACC* case.

The ACCL remedies the constitutional defect that the Court identified: the overlapping jurisdictions of the general court and the ACC in corruption cases. The Law's solution is to simply remove the general court's power to handle corruption cases (Article 5). The ACCL goes far beyond what the Constitutional Court's decision required, however. In this chapter, I argue that the Law carries dire consequences for the KPK and ACC and, with them, the future of Indonesia's anti-corruption efforts. I also highlight a number of loopholes and grounds for challenge in the Law that defendants might exploit to thwart KPK investigations and prosecutions and ACC trials. Some speculation is involved, but the prognosis for the KPK and ACC is not encouraging.

Diluting the ACC

The ACCL retains the ACC as a specialised court within Indonesia's general courts (Article 2). The Law requires that ACCs be established in the district court of each of Indonesia's 33 provincial capital cities and gives them jurisdiction over corruption cases that occur within the physical jurisdiction of that district court (Articles 3, 35). The only exception is Jakarta, which is to have ACCs in each of its municipalities, again with jurisdiction over the same area as their corresponding district courts (Article 4). These new courts are to be established within two years of the ACCL's enactment – that is, by 29 October 2011 (Article 35(4)). The Supreme Court is responsible for the rollout. At time of writing, several had been established and the court has declared that it intends to meet this deadline (*Hukumonline* 2011d).

Having 33 new provincial ACCs may appear to be a boon for the anti-corruption movement, particularly if the successes of Indonesia's first ACC, discussed in Chapter 2, can be replicated. Yet this appears unlikely, for reasons discussed in this chapter.

Composition of ACC panels

Under the ACCL, a combination of career and ad hoc judges continue to preside over ACC proceedings (Article 10(1)). However, ACC panels can now be either three- or five-judge. (As mentioned in Chapter 1, the KPK Law required five-judge panels.)

More significant, though, is that the ACCL seems to permit a majority of career judges to sit on ACC trials. The chairperson of the district court housing the ACC is also the chairperson of that ACC (Article 9(2)). For each case, he or she determines whether the ACC panel will have three or five judges and the ratio of ad hoc to career judges on that panel.[1] There must be either one or two ad hoc judges on three-judge panels and two or three on five-judge panels. According to the ACCL, factors relevant to determining the number and composition of judges will be set out in a Supreme Court Regulation. This had not been issued at time of writing. The Supreme Court has, however, informally indicated that every ACC case should have three ad hoc judges and two career judges (*Jurnal Nasional* 2010). Critically, however, the chairperson of the general court is a career judge. If the Supreme Court Regulation leaves some discretion to chairpersons, they might appoint a majority of career judges to all or many cases in order to control their outcomes. This is all the more likely given the shortage of ad hoc ACC judges, discussed below.

Having a minority of ad hoc judges on ACC panels would be a significant departure from the KPK Law, discussed in Chapter 1, which required that more ad hoc judges than career judges sit on each panel. As mentioned, having a majority of ad hoc judges seemed key to the success of the KPK and the ACC, with some convictions turning on an ad hoc judge majority. Having career-judge majorities would defeat the primary rationale for having ACCs: removing general court judges from holding sway in corruption cases. It significantly reduces the likelihood that the ACC will continue to reliably convict.

Incidentally, the influence of career-judge district court chairpersons might manifest itself in other ways. The chairperson of the Bandung District Court – in which Indonesia's second provincial ACC was established – declared conspicuously at its opening that the ACC should not fear acquitting if the defendant is not proven to be guilty (*Jurnal Nasional* 2010). This is true, of course, and respects the presumption of innocence, discussed in Chapters 2 and 5. But it also indicates that the ACC's 100 per cent conviction rate is at risk.

In search of ad hoc judges

To date, the Supreme Court has had difficulties finding capable ad hoc judges to fill the new ACCs required by the ACCL. The Supreme Court estimates that 240 judges are needed – including four for each first-instance ACC and two for each high court ACC panel (*Jakarta Post* 2011a). In its first recruitment round, held in early 2010, the Supreme Court netted only 27 candidates – 19 for first-instance ACCs, four for ACC appeal court panels and four for the ACC panel of

the Supreme Court (*Hukumonline* 2011a). In its second recruitment round, held later in 2010, 180 applicants passed the Supreme Court-administered entrance examination, but only 82 were ultimately appointed (56 for first-instance ACCs and 26 for appeal courts) (*Hukumonline* 2011a). From both rounds, then, the Supreme Court has obtained only around half the ad hoc judges that it estimates are required. A Supreme Court spokesperson partly attributes the lack of candidates to the ACCL's prohibition, in Article 15, upon ad hoc judges performing other work while serving on the bench (*Hukumonline* 2011a). Judges cannot even work as part-time lecturers, let alone continue to work in professions or run businesses they might have left to become ad hoc judges.

The ACCL requires, as mentioned, that all ACCs be established by 29 October 2011. The Supreme Court has announced that all 33 will not be established simultaneously but rather in stages. At time of writing, only three had been established – in Semarang, Bandung and Surabaya.[2] If the Supreme Court is to meet this deadline, two compromises might be necessary, both of which are likely to lessen the ACC's effectiveness. First, the Supreme Court could lower the entrance requirements for ad hoc judicial candidates. Some of the prerequisites – age and legal experience, for example – are imposed by the ACCL and so the Supreme Court cannot, legally, ignore them. It could, however, conceivably accept candidates who meet these statutory requirements but are otherwise mediocre in their legal and judicial abilities. Of course, this is not a desirable response to the ad hoc judge shortage – it will probably lead to lower-quality ACC decisions. It might also provide an entry point for corruption within the ACC. Less competent judges might be more likely to have difficulties grasping the legal and factual aspects of cases. In these circumstances judges might be more susceptible to corruption to 'resolve' the case without having to address the difficult issues it presents.

Second, the Supreme Court could spread the ad hoc judges it has more thinly across the 33 ACCs. The ACCL allows this. If ad hoc judges with sufficient expertise are not available to examine a corruption case in a particular court, then its district court chairperson can ask the district court chairperson from another province to second ad hoc judges (Article 38). A system of circuit ad hoc judges may thereby emerge. Though this might be a feasible short-term solution provided the new ACCs' caseloads are low enough, delays are likely as judges finish their cases in one ACC before moving to another. It may, therefore, cause breaches of the strict deadlines the ACCL imposes for deciding corruption cases.[3] Most likely, to avoid administrative complexity, the chairperson of an ACC with at least one ad hoc judge will simply allocate that judge and two career ACC judges to hear each corruption case.

An uncertain future for the KPK?

The ACCL is potentially even more deleterious for the KPK than the ACC. Ultimately, it might even bring an end to the KPK's jurisdiction to prosecute corruption cases. Indeed, according to media reports, many factions of the

parliamentary working committee (*panitia kerja*) that formulated the draft ACCL intended just that (Kustiani, Aprianto *et al.* 2009). Only several smaller parties (the National Awakening Party, Reform Star Party and the Justice and Prosperity Party) wanted to retain the KPK's prosecutorial powers (Handayani, Aprianto *et al.* 2009; Wright 2009).

Yet the ACCL, as enacted, is ambiguous. It neither explicitly removes nor endorses the KPK's prosecutorial powers. Indeed, it does not even mention the KPK. Rather, the ACCL refers only to public prosecutors (*penuntut umum*) bringing actions before the ACC. It merely defines, in Article 1(4), 'public prosecutor' to mean 'public prosecutor as regulated by law'.

The question becomes whether 'the law' – that is, other statutes or regulations – defines public prosecutor to include or exclude KPK prosecutors. There are legal arguments supporting both positions. One argument in favour of KPK inclusion relies on the 2002 KPK Law, which declares that prosecutors 'include public prosecutors in the KPK' (Article 51) and that the KPK comprises public prosecutors (Articles 38 and 39). One argument against the KPK inclusion is based on the 2004 Prosecution Law, which appears to define *penuntut umum* exhaustively to include only ordinary public prosecutors.

Neither argument is stronger than the other. When faced with two apparently conflicting laws, Indonesian lawyers usually resort to two principles of statutory interpretation. The first, *lex speciale derogat legi general* (a specific law trumps a general law), is used by those arguing that KPK prosecutors are *penuntut umum*. The nub of their argument is that the KPK Law is a specific law dealing with corruption, so its definitions should be preferred in corruption-related matters over the 2004 Prosecution Law which covers more general prosecutorial matters. The second, *lex posterior derogate legi anteriori* (a later law trumps an older law), holds that a newer law implicitly amends or revokes pre-existing laws to the extent of any inconsistency. Those who seek to exclude the KPK from prosecuting argue that the Prosecution Law was enacted two years after the KPK Law and, therefore, it overrides the KPK Law's inconsistent definitions.

At time of writing, these legal arguments were largely academic, however. Since the ACCL's enactment, the KPK has continued to prosecute and there has been no suggestion from the government or ordinary law enforcement institutions that it should stop.

Legal challenge to the KPK's jurisdiction to prosecute is, however, virtually assured on any of a number of grounds. Defendants might, as in the 'Three Judges' case discussed in Chapter 1, challenge the KPK's jurisdiction to prosecute in pre-trial proceedings. They could use the argument against the KPK's inclusion within the definition of *penuntut umum* mentioned above. If successful, judges might throw out the case against them. Defendants might also bring challenges before the Constitutional Court. They could argue that the ACCL creates legal uncertainty – a state of affairs prohibited under the Constitution. This ground was used successfully in the *Dawud Djatmiko* case, discussed in Chapter 3.

Defendants could also point to the Constitutional Court's decision in the *ACC* case, discussed in Chapter 3. According to the Constitutional Court, establishing

the ACC to hear corruption cases without also removing jurisdiction over corruption cases from the general courts created a dual system and, therefore, undermined equality before the law. Likewise, defendants might argue that having two institutions responsible for investigating corruption cases (the ordinary police and the KPK) and for prosecuting them (ordinary prosecutors and the KPK) leads to dualism and, therefore, inequality before the law.

Even presuming that the KPK retains jurisdiction to prosecute corruption cases, it faces another potential impediment to its performance: it has no provincial offices. This, it is feared, will make conducting investigations and trials in provinces difficult as the ACC rollout continues, thereby reducing the KPK's chances of success (Jasin 2010: 20). The KPK's jurisdiction is not limited to Jakarta, where the KPK's offices are located. Rather, as mentioned, it extends throughout Indonesia; indeed, the KPK Law specifically allows the KPK to have representatives in regional areas, including provinces (Komisi Pemberantasan Korupsi 2009b: 14). But establishing them is an expensive, time-consuming and difficult logistical exercise. Yet the KPK will probably need to do so to effectively prosecute cases. If it does not, some reformists fear that the KPK will be forced into a coordinating or advisory role in regional cases.

Also significant is that the ACC is no longer the exclusive domain of the KPK. Ordinary prosecutors can now prosecute in the ACC. Indeed, the Central Jakarta ACC began accepting cases brought by ordinary prosecutors in late January 2011 (*Hukumonline* 2011e; *Hukumonline* 2011c).

It did not take long for the ACCL to destroy the ACC's conviction rate. It happened in the very first case brought before the ACC by a public prosecutor. In late February 2011, the Central Jakarta ACC issued the court's first acquittal in what appeared to be a relatively insignificant case. The defendant was Mieke Henriett Bambang. She was a former secretary of Bank Indonesia Governor Burhanuddin Abdullah; he had been investigated by the KPK and convicted by the ACC for misusing Bank Indonesia funds, as mentioned in Chapter 2. Ironically, Bambang was indicted by ordinary prosecutors for impeding a KPK investigation. Prosecutors alleged that she had tampered with evidence during a KPK search of Abdullah's office. The KPK had sealed off documents held in a computer drawer; prosecutors alleged that she removed the documents and gave them to another employee. She claimed that she was merely following instructions and did not remove any materials (Silalahi 2011).

Compared with what might ordinarily be expected from a KPK prosecution, the public prosecutor's performance in this case seems poor. Normally, the KPK prepares long and detailed indictments, and allocates at least two prosecutors to each case. Here, however, the prosecution sent to Bambang's trial only one prosecutor with a five-page indictment. Worse, the indictment was so legally flawed that the ACC threw out the case even before witnesses were called. According to the court, the indictment did not clearly set out the crime for which the defendant was being prosecuted. The indictment, therefore, failed to meet Article 142(3) of the Code of Criminal Procedure, which requires indictments to be 'accurate, clear and complete' (Hukumonline 2011h).

This case does not bode well for the future of corruption prosecutions, many of which are now being brought by public prosecutors. Not only did the public prosecution commence its appearances in the ACCs with this very low profile case, but the way it handled the case cast serious doubt on its ability – perhaps even its intent – to effectively prosecute corruption cases. Unless prosecutorial performance improves, this will be the first acquittal of many.

Other potential impediments

Wiretapping

In December 2009, the Communications and Information Department released a draft government regulation on wiretapping that it had prepared. The draft sought to require that tapping be preapproved by the Communications and Information Ministry, a court or some other central body; and that suspects be charged before tapping could commence.

Though apparently applicable to all law enforcers, the draft seemed directed towards the KPK. This is because only the KPK has used its wiretapping powers repeatedly, aggressively and successfully (Atmasasmita 2009). The draft would thus remove a key weapon in the KPK investigation arsenal: authority to tap the phones of suspects with only the preapproval from its commissioners. The KPK has relied heavily on recorded conversations, particularly in the absence of other physical evidence of corruption (*Hukumonline* 2009j). Tapping has not only helped reveal corrupt deals and secure convictions (Pinto-Jayawardena 2010: 31), including those of Mulyana W. Kusumah, Artalyta Suryani and Al Amin Nasution (ICW 2009); it also exposed Bibit and Chandra's framing, as discussed in Chapter 5.

If the draft becomes law, those involved in corruption will know that their telephone conversations cannot be recorded unless they have been charged. Once charged, they will know that tapping can take place and so they might avoid incriminating conversations. Further, requiring outside authorisation could expose the process to corruption. For example, if judicial consent were needed, corrupt judges could warn suspects in return for a bribe (Butt 2010b). Adding bureaucratic layers to the process would also make obtaining authorisation time-consuming, giving suspects opportunity to dispose of evidence, flee overseas, or both (*Hukumonline* 2009k). And, if the KPK's full attention one day turns to the judiciary, district court judges might be reluctant to authorise the tapping of the phones of their brethren or court employees, let alone their superiors in the Supreme Court (*Hukumonline* 2009j).

Some legal experts, including Romli Atmasasmita (Atmasasmita 2009) and Constitutional Court Chief Justice Mahfud (*inilah.com* 2009), have argued that concerns about the draft are overblown. They point out that the KPK has statutory authority – the KPK Law – to wiretap and that this cannot be limited by a government regulation. According to Mahfud, if the regulation were passed, the KPK could safely ignore it (*inilah.com* 2009). With respect, these arguments are

unconvincing. The KPK Law states merely that the KPK has power to tap and record conversations when handling corruption cases (Article 12(a)). The Law does not set any conditions upon or procedures for its exercise. Broad grants of power such as these are found in most Indonesian legislation and further details are often left to government, presidential or other regulations. Provided that the proposed government regulation merely sets out how wiretapping powers should be exercised, including obtaining various permissions, it is unlikely to be found to conflict with the KPK Law. Only if it purported to take away the KPK's power to tap and record could it be said to do so.

Wiretapping emerged as a contentious issue during parliamentary debate over the ACCL. Some factions proposed that the KPK should not be able to authorise itself to wiretap and should require court approval (Handayani, Aprianto *et al.* 2009). The only mention of tapping that ultimately made its way into the ACCL is, however, in Article 28(1), which states that:

> All evidence adduced at trial, including evidence obtained through phone tapping, must be obtained legally (*secara sah berdasarkan ketentuan peraturan perundang-undangan*).

Some commentators have expressed concern that this provision might be read to require consent of a district court chairperson in order for the tapped conversation to be 'legal' (Kustiani, Aprianto *et al.* 2009). Legally, though, this view has little to commend it. As mentioned, the KPK Law clearly authorises the KPK to wiretap and record conversations. This, it appears, would give any evidence obtained from tapping or recording the legality that Article 28(1) requires.

By 2010, however, no government regulation on wiretapping had been enacted. The draft appeared to have been shelved. Nevertheless, the draft looms as a threat to the KPK's efficacy if this or a future Indonesian government wished to revive it.

Proposed amendments to the KPK and ACC Laws

In early 2011, members of the DPR had also sought to amend both the 1999 Anti-Corruption Law and the 2002 KPK Law. Again these efforts appeared intended to weaken the KPK. Proposed amendments to the 1999 Law sought to explicitly remove the KPK's power to prosecute and to reduce the criminal penalties for some types of corruption offences (*Hukumonline* 2011i). Amendments to the 2002 Law had not been drafted at time of writing. However, according to a 'Terms of Reference' obtained by Indonesia Corruption Watch, the proposed amendments sought to allow the KPK to formally issue Cessation of Investigation Orders (*Surat Keputusan Penghentian Penyidikan*, or SKPP). As mentioned in Chapter 1, the KPK's success has been partly attributed to its inability to drop an investigation once it has formally declared a person to be a suspect. The proposed amendments also sought to impose restrictions on the exercise of the KPK's wiretapping powers (*Hukumonline* 2011j).

Fortunately, both proposals were met with public outrage and harsh criticism led by the KPK and ICW, and President SBY sought to block them (*Jakarta Post* 2011d). Amendments to the 1999 Law were withdrawn from parliamentary consideration to allow further public consultation; and proposals to amend the KPK Law appear to have been shelved.

Further parliamentary interference

Parliamentarians have sought to interfere with or hamper the KPK's work in other ways. For example, in 2010, *Hukumonline* (2010g) reported that members of the parliamentary Commission on Law, Human Rights and Security had asked the KPK to stop handling particular cases. In 2011, a majority of the same commission refused to formally meet with Bibit and Chandra, claiming that, despite the case against them being dropped in the public interest, formally, they were still suspects (*tersangka*) (*Hukumonline* 2011f). Claims emerged that the refusal was politically motivated – particularly because the KPK had recently detained and charged several parliamentarians over the traveller's cheque scandal, discussed in Chapter 2. Amongst them was parliamentary Commission member Panda Nababan, who, incidentally, was still on the Commission, despite himself being named a formal suspect.

The national parliament has, at various times, also threatened to reduce the KPK's budget, usually while complaining about the KPK's performance. For example, in March 2010 some parliamentarians made such a threat, claiming that the KPK had been too slow to follow-up parliament's recommendations about the Bank Century case (*Tempo English Edition* 2010c). This was criticised on a number of fronts, including that it potentially compromised the KPK's independence; that the KPK should be judged on its performance as a whole rather than in one case; and that the KPK's evidence-gathering could, quite reasonably, take significant time (*Tempo English Edition* 2010c). Like the draft wiretapping regulation, this seems to be a hollow threat: no budget cuts appear to have been made. Yet, again, the threat remains in reserve for political purposes.

Most recently, some parliamentarians, including DPR speaker Marzuki Ali, have pushed for the KPK to be disbanded, citing declining public support, a dearth of suitable candidates to serve as KPK commissioners from 2012 and, again, its failure to handle the Bank Century case quickly enough (*Jakarta Post* 2011b). The KPK's disbandment is, however, highly unlikely in the foreseeable future. Others, including MPR Deputy Chairman, Lukman Hakim Syaifuffin, have argued that the KPK should be strengthened through constitutional recognition (*Jakarta Post* 2011c).

The KPK's inevitable quandary: bite the hand that feeds it?

The national parliament's enactment of an ACCL with potential to reduce the effectiveness of the KPK and ACC was not inadvertent. The proposed amendments, wiretapping regulation and budget threats should not be seen as isolated

incidents. All of them, it seems, are a continuation of the pushback against the KPK and ACC. Like previous instances discussed earlier in this book, the pushback has been initiated by those who were being, or could see themselves or their colleagues being, investigated by the KPK. This time, however, these people are members of the national parliament and government, who, as I showed in Chapter 2, have been in the KPK's firing line since 2008. Some of the KPK's previous opponents were able to mount strong opposition against the KPK and ACC – including the constitutional challenges and attacks on KPK commissioners discussed in Chapters 3–5. To aid their own counterattack, however, parliament and government have at their disposal greater and more easily utilisable powers: to make laws and determine budgets.

It is hardly surprising that parliament passed an ACCL that weakened the KPK and ACC, and provided rather obvious grounds for future challenge. A weakened KPK or ACC, or both, was in the interest of its members who, when they were deliberating the ACCL, felt threatened by the KPK's success. At that time, the KPK had announced that it was investigating corruption allegations involving more than 30 parliamentarians, both serving and former. In particular, by June 2009, the KPK had formally charged four of them for receiving bribes to elect Miranda Sway Goeltom as Bank Indonesia Senior Deputy Governor in 2004, as discussed in Chapter 2. By July 2009, 26 more knew they were under investigation in the same case. Even though some of them were no longer serving and those who were serving represented a small portion of the national parliament's 550 members, most of the 30 were from PDI-P or Golkar, the two largest political parties represented in parliament. These members were probably able to draw on support from other members of their parties and parliamentary factions. If other parliamentarians were involved in the same scheme or in other illegal activities the KPK was pursuing, they might also have had reason to support their embattled colleagues. The KPK was biting the hand that fed it at the very time that its provider was deciding its future.

The great irony is that the Constitutional Court, which in more recent years has been perhaps the KPK's and ACC's strongest supporter and ally, provided the trigger event for their weakening. The Constitutional Court's decision in the *ACC* case concerned only the ACC, not the KPK. Yet the Indonesian parliament took the opportunity presented by that decision to significantly change the way that both the ACC and the KPK function. A direct response to the Constitutional Court decision would have required only a statute re-establishing the AAC and its core functions, and giving it exclusive jurisdiction over corruption cases. The Constitutional Court decision did not require the parliament to expand the ACC network, tinker with the composition of judicial panels, or affect the KPK's functions.

Likewise with the draft wiretapping regulation: many government officials – including senior officeholders, such as ministers – and parliamentarians alike have been arrested after the KPK wiretapped their conversations (Husodo 2010). Others could expect to have their phones tapped in the future. The KPK's wiretapping power was, therefore, a strategic target, and one with significant government support.

This is, and, will probably always be, the KPK's primary strategic dilemma: pursue lower mid-level corruption and face condemnation by the public, legal fraternity and some politicians for lacking 'teeth'; or go for big corruption cases. Both avenues bring negative consequences for the KPK. If the KPK goes back to focusing on smaller cases, then it risks public ridicule and irrelevance. But if it aims higher, then it risks being crushed in retaliation. As this book has shown, many of its targets hold significant trump cards in the face of KPK action against them. Parliament has, and always will have, the legislative power to alter, and even close down, both the KPK and the ACC. It also controls the KPK's budget. Police are able to declare KPK commissioners as suspects, leading to their automatic suspension. Prosecutors can take KPK commissioners to trial, leading to their dismissal. Police and prosecutors are able to withhold secondments (*Hukumonline* 2010h). The legal infrastructure for anti-corruption efforts, therefore, although solid, is not without its cracks. Defendants have been able to open up these cracks through constitutional challenge. This is likely to continue.

The ACCs may well now be a lost cause, at least in the short term. The lack of appropriately skilled ad hoc judges is likely to force a majority of career judges onto ACC panels. The heavier influence of career judges is likely to expose ACC proceedings to 'court mafia' infiltration. The loss of its 'partner' would render the future success of the KPK uncertain. Yet despite all the challenges and setbacks, it seems that, with ever-increasing public support, the KPK remains determined to continue pursuing high-level corruption cases and to meet the ensuing obstacles placed in its path.

Postscript

In the face of attacks against it, the KPK continues to enjoy the Constitutional Court's support. In 2011, the court decided the *KPK Commissioners* case.[1] Like the Bibit and Chandra case discussed in Chapter 5, the decision seemed highly questionable from a legal perspective: the court made exceptions to its own long-established practices, expanded its jurisdiction and created new constitutional principles. Again, the court seems to have bent its own rules to support the KPK.

The background to this case is as follows. As mentioned in Chapter 5, in October 2009, with Antasari, Bibit and Chandra suspended, President SBY enacted an Interim Law to enable himself to appoint acting KPK commissioners without needing to follow the KPK Law's rigorous and time-consuming selection processes. Using this Interim Law, the President then appointed Mas Achmad Santoso, Waluyo and Tumpak Hatorangan Panggabean as temporary replacements. When Bibit and Chandra were reinstated, Santoso and Waluyo stood down. This left Panggabean, who had been appointed to replace Antasari, as acting KPK chairperson. He was forced to resign, however, when the DPR refused to endorse the President's Interim Law (Schütte 2011).[2]

Now required to follow the KPK Law's commissioner-appointment provisions, the President established a selection committee to shortlist two candidates for the KPK chairpersonship to present to the DPR. More than six months later, in November 2010, the DPR selected Busyro Muqoddas as KPK Commissioner. Muqoddas is a former chairperson of the Judicial Commission and a well-regarded reformist.

The DPR and President did not intend Muqoddas to serve a full term. The formal instruments they issued to select and appoint him purported to grant him the remainder of what would have been Antasari's term – approximately one year.[3] This caused significant consternation because the only KPK Law provision dealing with commissioners' terms – Article 34 – does not distinguish between temporary commissioners and commissioners serving full terms. It merely states that KPK commissioners serve four-year terms.

Two university law lecturers, a legal aid deputy director, one of Indonesia's best-known anti-corruption reformists, Teten Masduki, and NGO Indonesia Corruption Watch objected to Muqoddas' one-year appointment. They sought a declaration from the Constitutional Court that Muqoddas should serve a

four-year term. The applicants' primary legal argument was that Article 34 caused legal uncertainty because it did not specify whether it applied only to the appointment of KPK commissioners for new terms, to the selection of replacement commissioners, or both. This uncertainty, they argued, breached the constitutional right to legal certainty (Article 28D(1) of the Constitution). The applicants' request of the Constitutional Court in this case was highly unusual. They did not ask the court to strike down the statute under review. Rather, they requested that the court find Article 34 conditionally unconstitutional and order the government to comply with the interpretation of Article 34 that the applicants sought – that all duly-appointed KPK commissioners should serve four-year terms. To my knowledge, this sets the case apart from any other argued before the court. In other cases, applicants have asked the court to declare statutes invalid and to strike them off Indonesia's law books.

The court found that the wording of Article 34 was clear and of itself caused no constitutional problems. Article 34 did not distinguish between KPK commissioners selected along with other commissioners every four years ('appointment-round commissioners') and those appointed to replace commissioners unable to serve their entire term ('replacement commissioners'). Both would serve four-year terms.

However, the court found that the way the DPR and the President had interpreted Article 34 – so that replacement commissioners only served out the remainder of the term of the commissioner they replaced – presented two constitutional problems. First, the interpretation led to legal uncertainty because it contradicted Article 34's clear grant of four-year terms. The court decided that it needed to resolve this uncertainty. If it did not,

> the issue of the replacement of KPK Commissioners who do not stay in office for the duration of their term would remain an issue of debate that would continue to emerge when KPK Commissioners were replaced in the future. This breached the principle of just certainty guaranteed by the Constitution.
>
> (*KPK Commissioners* case: 72)

Second, the court found that Article 34 was discriminatory because, despite undergoing similarly rigorous, time-consuming and costly selection processes, replacement commissioners received shorter terms than appointment-round commissioners. This breached the rights to equal treatment before the law and in government (Articles 27(1), 28D(1) and 28D(3) of the Constitution).

The court, therefore, upheld the applicants' request to declare Article 34 conditionally unconstitutional. Article 34 would be unconstitutional unless interpreted to mean that all KPK commissioners, including replacement commissioners, hold office for four years (*KPK Commissioners* case: 77).

The court's decision in this case was nothing short of extraordinary, for three reasons. First, the court dramatically expanded its own judicial review jurisdiction to enable it to hear the case by declaring itself able to review the

constitutionality of the *interpretation* of a statute. This it had never done before. Second, the court gave its decision retrospective operation. This is the first judicial review case not concerning election results in which it has done so. Finally, the court created a new, vague, constitutional principle that it then declared had been breached.

In my view, these three aspects of the decision – and its timing – indicate the Constitutional Court's continuing determination to stand up for the KPK, even at the expense of maintaining consistency with its own previous decisions, perhaps even at the expense of the rule of law. In this sense, the decision resembles the Bibit and Chandra case, discussed in Chapter 5. To demonstrate this, I will now briefly consider the court's relevant previous jurisprudence and then show how the *KPK Commissioners* case departs from it. I will also critique the constitutional principle the court created.

Reviewing the implementation or interpretation of Article 34

In order to even begin considering the *KPK Commissioners* case, the court needed to overcome a significant obstacle: the line of cases in which it had declared that it lacked jurisdiction to review the constitutionality of the way statutes were implemented. Pointing to this restriction, the court had, in previous cases, refused to assess the constitutionality of government action and of government regulations and decisions.[4] The court's stance was very clear: unless the actual terms of the statute contradicted the Constitution, the court would not consider invalidating it.

For example, in a 2008 case,[5] the court was asked to consider whether some of the Criminal Code's defamation provisions breached the constitutional freedom of speech. The court decided that they did not. It was also asked to consider whether the defamation provisions should be struck down because they were misapplied to ensnare those who accused public figures of corruption or other impropriety. The court refused to intervene, declaring that it could only review the Code provisions themselves as against the Constitution. It had no power to consider the way that the Code provisions may have been misused. The court hinted that if it did, then it might have invalidated these Code provisions because they were often used to stifle legitimate public comment and debate, both of which were critical to Indonesia's democratic practices.[6]

In the *KPK Commissioners* case, however, the court declared explicitly, for the first time, that its mandate to uphold the Constitution required it to review not only the substance of statutes, but also their implementation:

> [T]he DPR and the President can interpret a statute to implement that statute. However, the court has jurisdiction to review the constitutionality of the interpretation of a statutory norm implemented by the DPR or the President if that interpretation threatens the respect, protection and fulfilment of the constitutional rights of citizens, in the context of guaranteeing the implementation of the mandate and norms of the Constitution. By so doing the

> court does not exceed its jurisdiction to review statutory norms as against the Constitution.… Article 1(2) of the Constitution – which declares that 'Sovereignty is in the hands of the people and is implemented in accordance with the Constitution' – requires that the administration of the state by the organs of the state must be based on the Constitution. It is on this basis that Indonesia is a state adhering to constitutional government.… If the court discovers the implementation of a statutory norm that breaches, diverges from or is inconsistent with the norms and spirit of the Constitution, then by virtue of its function, tasks and jurisdiction to uphold the Constitution, the court has jurisdiction to review the constitutionality of the interpretation of a statutory norm.
>
> (*KPK Commissioners* case: 70–71)

Retrospective operation

In all but one of its previous cases the court has refused to give its decisions retrospective effect.[7] Rather, the court has declared that its decisions can only be prospective in operation. If the court declares a statute invalid, it will be invalid only from the moment the court reads out its decision to invalidate it. Any government or other action taken under the statute before its invalidation remains valid and legal.

For example, in a 2010 case, the court found that the Attorney-General had been holding office unconstitutionally for several months.[8] The court required the Attorney-General to step down at the moment the court finished reading its decision. But the court's decision did not render illegal any acts performed by the Attorney-General – such as orders to prosecute particular suspects – provided that they were performed before the court issued its decision. Similarly, in a 2006 case,[9] the court struck down provisions of the Criminal Code that prohibited insulting the president and vice-president. Nevertheless, one of the applicants was tried and convicted under those provisions after the court had handed down its decision. He had insulted the president before the court had invalidated the provisions (Royan 2008).

These cases presented a hurdle for the court in the *KPK Commissioners* case: even if the court found Article 34 to be unconstitutional (conditionally or otherwise), its decision would not apply to allow Muqoddas to serve a full term unless its decision applied retrospectively. This is because Article 34 had already been applied, albeit erroneously in the eyes of the court, to limit Muqoddas to serving out Antasari's term.

Prior to *KPK Commissioners*, the only case in which the court had declared that its decision operated retrospectively was the *Sisa Suara* case, which involved the constitutionality of the way votes had been counted in the 2009 General Election. In that case, the court claimed that:

> [t]he Court's decisions in election cases, including disputes over counting and the allocation of parliamentary seats, must be able to be applied to the

> very voting and allocations disputes [complained of]. If not, then the purpose of the constitutional protections provided by electoral disputes and judicial review … will not be fulfilled as the Constitution intends.[10]

As mentioned, in the *KPK Commissioners* case, the court gave retrospective effect to its decision:

> Even though according to Article 47 of the Constitutional Court Law, Constitutional Court decisions operate prospectively, in the interests of utility (a universal legal norm and objective) the Court can give its decisions retrospective effect in certain cases. This became jurisprudence in [the *Sisa Suara* decision] … The reasons for declaring that a particular decision operates retrospectively include that the law had been, and is continuing to be, erroneously interpreted, leading to legal uncertainty and constitutional damage that must cease. To [do this, the decision] must operate retrospectively from the time the erroneous interpretation was stipulated – the moment when the legal uncertainty and constitutional damage began … Therefore, to avoid legal uncertainty in the transition period as a result of this decision, this decision applies to KPK Commissioner replacements who have already been chosen.[11]

Despite the court's reference in this passage to the *Sisa Suara* case establishing jurisprudence allowing the court's decisions to operate retrospectively, the court has not, to my knowledge, followed that jurisprudence in any of the dozens of judicial review cases it has decided since the *Sisa Suara* case, except for the *KPK Commissioners* case. This is arguably because *Sisa Suara* was, in fact, a special case. Had the court adopted its usual practice of giving its decision effect from the time it was read out in court, then its decision would have had little or no purpose or utility. The uncertainties about the way votes were counted would have remained, causing significant political instability, and resolving them might have required a recount or even a new election. If this is correct, then the court's reference to *Sisa Suara* appears to have been designed to give this aspect of its decision an air of authority or consistency. However, it seems likely that the court engaged in 'legal norm shopping' (Fitzpatrick 1997) to reach the conclusion it desired.

New implied rights

In addition to finding the government's interpretation of Article 34 unconstitutional for breaching the rights to legal certainty and equality, the court decided that it also contravened the 'community's sense of justice'. This, according to the court, is a higher-order constitutional principle with which the state must comply. In the words of the court:

> Community justice is the source of the highest constitutional values that must form the basis of the court's evaluation, because community justice is

> nothing other than justice for constituents – that is, justice for the people, who created and endorsed the Constitution. Community justice becomes very important in upholding constitutional principles to avoid elitist administration of state that breaches democratic principles adhered to by the Constitution.
>
> (*KPK Commissioners* case: 74)

According to the court, the government's interpretation of Article 34 violated this principle of community justice. The full KPK commissioner selection process was very time-consuming, complicated and costly for both the government – hence the people – and the candidate. Requiring replacement commissioners to undergo the process was, according to the court, excessively wasteful unless a full four-year term was granted. Indeed, according to the court, the cost of selecting a single replacement commissioner approached the cost of selecting all five commissioners at once. The community abhorred waste, so community justice demanded that successful candidates serve a full term. If replacement commissioners served out only the remainder of terms, a more proportional mechanism would be to appoint the unsuccessful candidate who had come closest to being selected during the previous appointment round. This was how national and local legislators were replaced. Granting four-year terms for replacing commissioners would have the added benefit of helping the continuity of the KPK's work.

With respect, resorting to unspecified 'community justice' to decide important constitutional cases such as this seems undesirable for a number of reasons. I will discuss two in particular. First, the court 'found', as it did in the Bibit and Chandra case, a principle within the Constitution to support its decision. The concept of 'community justice' (*keadilan masyarakat*) does not appear in the text of the Constitution itself, yet the court identified it as the 'source of the highest constitutional values'. Some of the problems with 'implying' such principles were discussed in Chapter 5 and seem equally applicable to this case. In particular, if community justice was such a fundamental constitutional principle, then why did the drafters not include it in the text during the 1999–2002 amendments?

Second, resorting to the concept of 'community justice' adds an air of arbitrariness to the decision in the case. The vagueness and subjectivity of 'community justice' makes it susceptible to use as a judicial channel for elevating any values – including the judges' own personal perspectives – as values of community justice. It allows the court to review any statute on almost any ground and then declare that doing so is necessary to preserve community justice. Indeed, invoking the principle could have led to a very different conclusion. For example, the court could have held that, given the prevalence of corruption in Indonesia and its deleterious effects, community justice demanded that corruption be reduced or eradicated at any cost. In this context, the expense of appointing just one commissioner might have been insignificant. Instead, the court chose to interpret community justice to require government thriftiness.

Many of the court's own criticisms of material unlawfulness in the *Dawud Djatmiko* case, discussed in Chapter 3, appear to be applicable to its own

sion in *KPK Commissioners*. Specifically, in *Djatmiko*, the court was critical of the use of community or moral standards to determine whether an act was legal – particularly because such standards were previously undefined – and hence uncertain and unfair to apply. In *Djatmiko*, the court also pointed out that Indonesia's ethnic, religious and cultural diversity made identifying a single set of community standards very difficult, if not impossible. Ironically, in *KPK Commissioners* the court appears to have endorsed a concept to which the same criticisms apply, albeit this time as a yardstick for constitutionality.

Timing of the decision

The timing of the decision also seems to support the hypothesis that the Constitutional Court's primary concern in the *KPK Commissioner* case was to help the KPK. The ruling came just before the start of the selection process for five new KPK commissioner positions; the deadline for candidates to register closed only a few hours after the decision was handed down. Presumably, issuing its decision before this deadline avoided confusion over the number of commissioner positions the Selection Committee was required to fill.

More significant, however, was that the decision came only three working days before the enactment of important amendments to the 2003 Constitutional Court Law.[12] Constitutional Court judges would have known that enactment was imminent and that some of the amendments were directed at reining in the court – in particular, to stop it acting as a 'positive legislator' (Hukumonline 2011k). The amendments, if enacted before the decision was issued, may well have prevented the court from handing down the decision it did in the *KPK Commissioners* case.

One purpose of the amendments seems to be to prevent the court from handing down 'conditional constitutionality' or 'conditional unconstitutionality' decisions. Two provisions are relevant. First, Article 57 provides that if the court declares a statutory provision to conflict with the Constitution, that provision no longer has legal force. Article 57(2a) – one of the 2011 amendments – prohibits the Constitutional Court from issuing declarations other than those referred to in Article 57. Second, Article 57(2a) specifically prohibits the court from issuing 'formulations or norms to replace the norms of legislation that are declared to conflict with the Constitution'. The court does both of these things when it issues conditional constitutionality decisions. It did so in the *KPK Commissioners* case: rather than simply invalidating Article 34 (as Article 57(1) seems to require), the court made the constitutionality of Article 34 subject to a new formulation of Article 34, to specify that both appointment-round and replacing commissioners have four-year terms.

In light of the DPR's pushback against the KPK, it seems reasonable to speculate that the court feared that the DPR would seek to fill the KPK with loyalist commissioners at the next appointment round. By handing down its decision when it did, it could ensure that the KPK would have a reputable chairperson for four years rather than one.

Notes

Introduction

1 The lower on the list, the worse the perceived corruption. See www.transparency.org.
2 See, for example, Liddle 2002; Webber 2006; Weiss 2007: 37; Carnegie 2008: 515; Davidson 2009: 294.

1 Corruption, the KPK and the ACC

1 See, for example, Transparency International Global Corruption Barometer 2009, available at: www.transparency.org/policy_research/surveys_indices/gcb/2009; Heritage Foundation 2009 Index of Economic Freedom, available at: www.heritage.org/Index/Country/Indonesia; World Economic Forum Global Competitiveness Report 2009, available at: www.weforum.org/en/index.htm.
2 Rose-Ackerman 1999: 2–3; Pearson 2001: 35; Buscaglia and Dakolias 1999: 1; Mauro 1995; Azfar *et al.* 2001.
3 This argument is discussed by Sherlock (2002: 377).
4 Though, of course, prevention, including through education, monitoring, and structural change, is also a critical part of corruption eradication (de Ferranti and Ody 2009). It is not, however, the focus of this book.
5 Law No 31 of 1999.
6 Law No 20 of 2001 amending Law No 31 of 1999.
7 The 1999 Law replaces an earlier Anti-Corruption Law (No 3 of 1971). Provisions in the Indonesian Criminal Code, enacted in 1918, have long prohibited corruption in its various forms (see, for example, Articles 418–20) and a 1980 Bribery Law prohibited offering and accepting bribes. The Criminal Code and Bribery Law were, however, rarely utilised to prosecute corruption cases Hamzah 1984. Most of the Criminal Code definitions have now been imported into the 1999 Law, with sharply increased penalties.
8 Most Indonesian statutes and government regulations are accompanied by an official Elucidation (*Penjelasan*). Elucidations usually attempt to clarify the general rationale for the law and explain particular articles of the law in more detail.
9 Elucidation to Article 2(1).
10 Article 1(2) of Government Regulation No 65 of 1999; Article 4(2) of Government Regulation No 127 of 1999.
11 Article 2(1) of Government Regulation No 127 of 1999; Articles 1(7), 12 and 17(1) of Law No 28 of 1999.
12 Article 20(1) of Law No 28 of 1999.
13 Article 27 of the 1999 Anti-Corruption Law required that the Joint Team be established; Government Regulation No 19 of 2000 on the TGPTK provided more detail about its functions and structure.

14 Article 12(4) of Government Regulation No 19 of 2002.
15 Government Regulation 19 of 2000 stipulates that the Joint Team must complete its investigations within 180 days (Article 12(1)) and then transfer the case file to prosecutors within 20 days (Article 12(2)). Prosecutors must then hand the case over to the court within 20 days (Article 12(3)).
16 For a more detailed account of the 'Three Judges' case, see Butt and Lindsey (2010a), from which this description draws.
17 For a detailed account of Indonesia's troubled record on enforcement of judicial decisions, see Butt (2008a).
18 Government Regulation No 19 of 2000 on the Joint Team.
19 Article 4 of Law No 37 of 2008.
20 In 2009, the National Ombudsman received 1237 official complaints, up 17.23 per cent from 2008 (Ombudsman Republik Indonesia 2010: 20). In 2010, it received 1,154 reports, suggesting that this higher level of public engagement with the Ombudsman may hold steady.
21 Law No 37 of 2008.
22 In 2003, each of the 600 annual recruits to the police force were required to pay a Rp30 million bribe (World Bank 2004a: 84). PriceWaterhouseCoopers (2001) *Focus on People: Report of the Governance Audit of the Indonesian Public Prosecution Service*, prepared for the Asian Development Bank (cited in World Bank (2004a: 87)) made similar findings about prosecutors.
23 The KPK had in 2009–2010 between 550 and 650 staff members, including 80 police officers, 25 public prosecutors and 102 auditors from the Finance Development Controller and the Supreme Audit Board (*Hukumonline* 2010s; Baskoro 2009; Pinto-Jayawardena 2010: 19; Komisi Pemberantasan Korupsi 2009b: 84).
24 To appoint the team, the KPK establishes a selection committee to advertise for, identify, and receive public input about, potential candidates. The selection committee then gives a list of five candidates to the KPK, from which four are chosen.
25 Schütte explains that in 2003 the selection committee comprised highly-esteemed legal experts. It was chaired by former chairperson of the KPK Law drafting team, Romli Atmasasmita, and had eminent human rights lawyers Adnan Buyung Nasution and Abdullah Abdul Ghani as deputy chairpersons. Its membership drew from high-ranking prosecutors and police, academics and civil society representatives (Schütte 2011).
26 *Pancasila's* five principles are: *Ketuhanan Yang Maha Esa* (Belief in Unitary Deity), *Kemanusiaan Yang Adil dan Beradab* (Just and Civilised Humanity), *Persatuan Indonesia* (Unity of Indonesia), *Demokrasi* (Democracy), *Keadilan Sosial* (Social Justice).
27 The KPK receives community complaints and corruption reports through a variety of channels, including in person, by telephone, post, email, SMS and fax. Between 2004 and 2009 the KPK received 38,738 reports from the public. As of December 2009, 38,388 of these had been reviewed and 350 remained under review (Komisi Pemberantasan Korupsi 2009b: 76).
28 The Elucidation describes the handover as jurisdictional, rather than physical. This means that if the suspect or defendant is already in police or prosecutor detention, then he or she can remain there even after the KPK has 'taken over' the case.
29 The term ad hoc in this context is a misnomer, largely because, in practice, ad hoc judges are employed as judges for a particular period, rather than being 'called in' to sit on specific types of cases relating to their particular areas of expertise.

2 The KPK and ACC's performance: 2005–2010

1 Interview with Indonesian human rights lawyer, Jakarta, 17 July 2007.
2 Indonesian law provides for the presumption of innocence in Article 8 of Law 4 of 2004 on the Judiciary; Article 18 of Law No 39 of 1999 on Human Rights; and Article 66 of the KUHAP.

3 Interview with advocate, Jakarta, 15 July 2007.
4 Baharuddin Aritongang; Antony Zidra Abidin; Ahmad Hafiz Zawawi; Paskah Suzetta; Reza Kamarullah; Asep Ruchimat Sudjana; T.M. Nurlif; Marthin Bria Seran. Boby Suhardiman and Hengky Baramuli were not detained due to ill health and Azhar Muklis has since died.
5 Willem Tutuarima; Sutanto Pranoto; Agus Conro Prayitno; Muhammad Iqbal; Budiningsih; Poltak Sitorus; Rusman Lumbantorum; Max Moein; Matheos Pormes; Engelina Pattiasina; Ni Luh Mariani Tirtasari; Soewarno; Panda Nababan. Jeffrey Tongas Lumban and Aberson Sihaloho have since died.
6 Daniel Tandjung and Sofyan Usman.
7 First-instance courts heard 82 corruption cases, high courts seven, and the Supreme Court 14, 11 of which were heard on cassation and three on review (*peninjauan kembali*).
8 This decision is highly questionable. As Indonesian Corruption Watch (2008) points out, Article 4 of the 2001 Anti-Corruption Law states specifically that returning the money does not remove criminal liability for corruption.

3 Early pushback

1 As noted by the court itself in Constitutional Court Decision No 012–016–019/PUU-IV/2006 at 289.
2 Constitutional Court Decision No 006/PUU-I/2003, reviewing Law No 30 of 2002 on the Corruption Eradication Commission.
3 Constitutional Court Decision No 069/PUU-II/2004, reviewing Law No 30 of 2002 on the Corruption Eradication Commission.
4 Constitutional Court Decision No 069/PW-II/2004 at 64–65.
5 Similar grounds were argued by Manoppo's lawyers in his own trial. They lodged an objection (*eksepsi*) to the prosecution's indictment, referring to the Constitutional Court decision and arguing that the case should not proceed because the alleged crime took place between February and November 2002 (*Hukumonline* 2005f).
6 Some DPR members also seemed concerned to make the same point (*Hukumonline* 2005a).
7 Constitutional Court Decision No 001–021–022/PUU-I/2003, reviewing Law No 20 of 2002 on Electricity.
8 Constitutional Court Decision No 013/PUU-I/2003, reviewing Law No 16 of 2003 on the Stipulation of Interim Law No 2 of 2002 on the Application of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism in the Bali Bomb Explosion on 12 October 2002 as a Statute.
9 Constitutional Court Decision No 2–3/PUU-V/2007, reviewing Law No 22 of 1997 on Narcotics.
10 Constitutional Court Decision No 21/PUU-VI/2008, reviewing Law No 02/Pnps/1964 on Procedures for Carrying out the Death Penalty.
11 Constitutional Court Decision No 03/PUU-IV/2006. This section draws on Butt 2009b.
12 Law No 31 of 1999 on the Eradication of Corruption as amended by Law No 20 of 2001.
13 Supreme Court Decision No 42K/Kr/1966; Supreme Court Decision No 97K/Kr/1973.
14 Supreme Court Decision No 30K/Kr/1969.
15 Supreme Court Decisions No 30K/Kr/1969 and 43K/Kr/1973.
16 Supreme Court Decision 275K/Pid/1982.
17 Supreme Court Decision No 1847/Pid/2006, herein referred to as 'Syamsuddin'.
18 Decision No 10/Pid.B/TPK/2005/PN.JKT.PST.
19 Decision No 10/Pid.B/TPK/2005/PN.JKT.PST.

20 Supreme Court Decision No 2284/Pid/2006, herein referred to as 'Kantaprawira'.
21 Supreme Court Decision No 2608 K/Pid/2006, herein referred to as 'Rojadi'.
22 Court Decision No 537K/Pid/2007, herein referred to as 'Toemio'.
23 Supreme Court Decision 1116 K/Pid/2007, herein referred to as 'Winata'.
24 Sapardjaja (2002: 190–1) notes that some scholars interpret the material unlawfulness concept, reflected in Article 16(1) and its almost identical predecessors in earlier judiciary laws, as allowing judges to consider general legal principles or adat (customary law) in their decisions which, by definition would, presumably, reflect community values.
25 In all cases, the court cited the works of H.J. Hamaker (Het Recht en de Maatschappij and Recht, Wet en Rechter) and of I.H. Hymans (Recht der Werkelijkheid) without providing any further bibliographical details of these works. The court also cited Prof. Dr Achmad Ali, 2002, *Menguak Tabir Hukum: Suatu Kajian Filsosfis dan Sosiologis*, Toko Gunung Agung, Jakarta.
26 Citing Lie Oen Hock, 'Jurisprudence as a Source of Law', speech given at his inauguration as Extraordinary Professor of Legal Studies and Indonesian Law at the Faculty of Law and Community Knowledge, University of Indonesia in Jakarta, on 19 December 1959, p. 11.
27 The court did not refer to any bibliographic details of Radbruch's work.
28 Well-respected doctrine and jurisprudence are considered to be sources of law in many countries following the civil law tradition (Merryman 1984).
29 Hutapea was said to have represented Kantaprawira pro bono because Kantaprawira was his lecturer at University of Padjajaran (*Hukumonline* 2005g).
30 Constitutional Court Decision No 012–016–019/PUU-IV/2006 at 283.

4 The Antasari trial

1 Decision No 1532/PIDB/2009/PN.JKT.SEL.
2 Prior to his appointment as KPK chairperson, his posts included head of the Public Prosecutors' offices in Batu Raja and South Jakarta, spokesman for the AGO, head of the High Public Prosecutors' office of Southwest Sulawesi, and Prosecution Director as Deputy Attorney-General (Baskoro and Sutarto 2010).
3 Some critics claimed that Antasari was reluctant to pursue cases involving parliamentarians who supported him when he underwent his fit and proper test in the House (Handayani, Kustiani *et al.* 2009).
4 In Indonesia, the standard of proof in criminal cases is that guilt has been proven 'validly and convincingly' (*sah dan menyakinkan*). Many Indonesian commentators argue that this is roughly equivalent to the common law standard of 'beyond reasonable doubt'.
5 Given that this is a summary of the indictment, as contained in the case file, I have omitted page references. The indictment appears on pp. 3–15 of the case transcript (on file with author).
6 Sexual intercourse out of wedlock in Indonesia remains a crime (Butt 2003).
7 According to *Tempo*, the police raided Nasruddin and Rhani's room in Kendari in the middle of the night. They were taken to the local police station, but released after Rhani's mother faxed evidence that they were married (Baskoro and Kustiani 2009).
8 In Indonesian, the common term for he or she – '*dia*' – is gender neutral.
9 The judgment also seeks to establish Eduardus's intent, as evidenced by his declaration to Williardi that the team was ready. The judgment does not explain why establishing Eduardus's intent was relevant to Antasari's culpability nor why, if establishing Eduardus's intent was important, efforts were not made to establish the intent of others involved in the plot. Under the intent heading, the court also discussed another issue that seems entirely irrelevant to the intent of anyone involved in the plot. Referring again to the meeting between Williardi, Lo and Eduardus at

Ancol Bowling on 2 February 2009, the court noted that Williardi said he needed civilians to follow Nasruddin because the police 'cannot follow this person non-stop for 24 hours'. The court found this statement strange and illogical, because police are trained to work for 24 hours straight (p. 172). And, by involving non-police, Williardi's target and objectives 'became questionable, particularly when considered alongside Lo's testimony, who said that after he introduced Williardi to Eduardus he did not want to be involved further, because he was concerned about the consequences' (p. 173).

10 Citing *Hoge Raad* case 22 March 1909.
11 The following description draws on Butt (2008b).
12 According to the appeal memorandum, a prosecutor had disputed this during the trial and attempted to demonstrate in court that the weapon was in good working order. The prosecutor had difficulties pulling the trigger, all the while pointing the gun at the expert witness.
13 See p. 108 of the transcript.
14 See pp. 10, 13, 104 of the transcript.
15 See pp. 8, 23 of the transcript.
16 See p. 172 of the transcript.
17 www.metrotvnews.com/index.php/metromain/newsvideo/2009/12/15/95987.
18 Susno is perhaps most famous for his involvement in the Bank Century scandal, mentioned in the introduction to this book. Susno was also investigated for misappropriating around Rp13.5 billion allocated for security in the West Java governorial election in 2008, when he was West Java police chief. He was also investigated for receiving a bribe to speed up an investigation into fraud at PT Salma Arowana Lestari, Riau (*Hukumonline* 2010j).

5 The Bibit and Chandra case

1 Interim Law No 4 of 2009 on the Amendment of Law No 30 of 2002 on the Corruption Eradication Commission.
2 By Presidential Decision No 77/P of 2009, 5 October 2009.
3 The Considerations section of a law contains the reasons for its enactment and references to other relevant laws. It is usually found in the opening paragraphs of the law.
4 Pursuant to Presidential Decision No 27 of 2009 of 23 September 2009 on the Establishment of the Team to Recommend Prospective KPK commissioners. The team comprised Taufiequrachman Ruki, Adnan Buyung Nasution, Widodo AS, Andi Mattalata and Todung Mulya Lubis.
5 The Golkar faction added that the Interim Law was superfluous because the KPK Law already provided for vacancy-filling in Article 33. The Golkar and PDI-Struggle factions objected to the Interim Law's usurpation of parliament's right to select KPK leaders, thereby avoiding parliamentary scrutiny through its fit and proper tests (Ramidi 2010; Alwie *et al.* 2010).
6 The formal citation for the case is: Constitutional Court Provisional Decision No 133/PUU-VII/2009, reviewing Law No 30 of 2002 on the KPK. Herein I call it the '*Bibit and Chandra Injunction*'.
7 Law No 24 of 2003 on the Constitutional Court.
8 *Bibit and Chandra Injunction*, para 3.12.
9 *Bibit and Chandra Injunction*, para 3.10. Article 16 allows the court to stay or delay its own proceedings if the applicant alleges that the statue under review was drafted by means of a criminal act. Presumably, the rationale for this provision is that any criminal proceedings should be resolved in the general courts before the Constitutional Court hears the case. Halting its own proceedings pending the outcome of criminal proceedings is very different to issuing an interim injunction, however, under which the court orders an entity to perform an act or refrain from performing an act for a particular time period, usually until it has finished hearing the case.

10 *Bibit and Chandra Injunction*, para 3.12.
11 *Bibit and Chandra Injunction*, para 3.13.
12 *Bibit and Chandra Injunction*, para 3.14.
13 *Bibit and Chandra Injunction*, para 3.11.
14 *Bibit and Chandra Injunction*, para 3.13.
15 *Bibit and Chandra Injunction*, para 3.16.
16 Constitutional Court Decision No 2–3/PUU-V/2007 reviewing Law No 22 of 1997 on Narcotics.
17 Constitutional Court Decision No 2–3/PUU-V/2007 reviewing Law No 22 of 1997 on Narcotics, para 3.11.
18 Law No 16 of 2004.
19 This raises the issue of why Mahendra was granted standing to bring the claim in the first place. This was questionable for at least two reasons. First, a key pre-requisite for standing is the possibility that, if the court upholds the application, the constitutional damage will not occur or reoccur. If the Constitutional Court's decision could not possibly have assisted Mahendra, even on the grounds the court mentioned for rejecting the injunction application, then it appears that this prerequisite was not met. Second, in other parts of its judgment (see, for example, para 3.7), the court noted that Mahendra had been declared a suspect and investigated on the basis of a formal order of the Director of Investigations on behalf of the Deputy Attorney-General for Special Crimes, not the Attorney-General himself. It is difficult, then, to see how Mahendra had an interest in whether the Attorney-General held office legally.
20 The official case reference for the court's decision is Constitutional Court Decision No 133/PUU-VII/2009, reviewing Law No 30 of 2002. Herein I refer to it as the '*Bibit and Chandra Decision*'.
21 *Bibit and Chandra Decision*, p. 4.
22 Articles 19(1) of the Judiciary Law; Article 40(1) of the Constitutional Court Law.
23 Article 31(2) of the Constitutional Court Law.
24 Article 19(2) of the Judiciary Law.
25 *Bibit and Chandra Decision*, para 3.16.
26 The following discussion draws on the Team Eight report, entitled *Laporan dan Rekomendasi Tim Independen Verifikasi Fakta dan Proses Hukum atas Kasus Sdr. Chandra M. Hamzah dan Sdr. Bibit Samad Rianto*, reproduced in full in *Kompas* (2009d).
27 Several days after the recordings were aired in the Constitutional Court, the Team of Eight issued interim recommendations, including that Susno Duadji and Abdul Hakim Ritonga be dismissed from their positions. In particular, the team noted that Susno had a conflict of interest: he was at once Chief of Police Detectives and, as such, could influence the Bibit and Chandra investigation; at the same time, the KPK was investigating him over the Bank Century case, outlined in the introduction to this book. The team declared that the wiretapped conversations made it clear that 'legal mafia practices' (*praktik mafia hukum*) were at play in the Bibit and Chandra case. It noted also that the case indicated widespread institutional and systemic problems, not merely a few rogue individuals.
28 A case broker, in the Indonesian context, is an individual who negotiates, on behalf of a party in a case, with law enforcers so as to obtain a favourable outcome, usually in return for a bribe.
29 Such as if the accused dies, the statute of limitations has expired or the accused has already been tried for the same crime (double jeopardy): Articles 7(i) and 109(2) of the Criminal Code; Article 16(1)(h) of Law No 2 of 2002 on the Police Force.
30 Article 140 of the Code of Criminal Procedure.
31 The legal basis for *deponering* is Article 35 of Law No 16 of 2004 on the Public Prosecution.
32 By Presidential Decision No 101/P of 2009, 4 December 2009.

33 *Bibit and Chandra Injunction*, p. 14.
34 Article 6 of the UDHR: Everyone has the right to recognition everywhere as a person before the law; Article 7 of the UDHR: All are equal before the law and are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination; Article 11(1) of the UDHR: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence; Article 14(2) of the ICCPR: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence; Article 16 of the ICCPR: Every person shall have the right to recognition everywhere as a person before the law.
35 *Bibit and Chandra Decision*, para 3.18.
36 *Bibit and Chandra Decision*, para 4.3. Muhammad Alim, in a separate concurring judgment, imposed the same conditions on the constitutionality of Article 32(1)(c). He emphasised that, by comparison to other public officeholders, Article 32(1)(c) discriminated against KPK chairpersons, thereby breaching the constitutional requirement that citizens have equal treatment before the law under Articles 27(1) and 28D(1) of the Constitution. He also accepted that the presumption of innocence was not only a domestic and international legal principle, but also an Islamic rule. This was a relevant interpretative consideration, he opined, because the Constitution declared Indonesia a state based on Almighty God.
37 Article 19(1) of the Judiciary Law; Article 31(2) of the Constitutional Court Law.
38 Constitutional Court Decision No 006/PUU-III/2005, and Constitutional Court decision No 11/PUU-V/2007.
39 *Bibit and Chandra Decision*, para 3.19.
40 *Bibit and Chandra Decision*, para 3.20.
41 Constitutional Court Decision No 001–021–022/PUU-I/2003, reviewing Law No 20 of 2002 on Electricity, (the '*Electricity Law Case*') p. 327.
42 Constitutional Court Decision No 005/PUU-I/2003, reviewing Law No 32 of 2002 on Broadcasting, pp. 75–76. Nevertheless, the court has made it clear that there must be a 'reasonable chance' of constitutional damage occurring in the future (*Electricity Law case*, 2003, p. 327; Constitutional Court Decision No 003/PUU-II/2005, reviewing Law No 19 of 2004 on the Stipulation of Interim Law No 1 of 2004 on Amendments to Law No 41 of 1999 on Forestry as a Statute, p. 11). The court has applied this 'potential' damage rule inconsistently in a handful of cases. For example, in the *Taxation Court Law case* (Constitutional Court Decision No 004/PUU-II/2004, reviewing Law No 14 of 2002 on the Taxation Court, p. 42), the court stated that 'those who can lodge an application are those whose constitutional rights have already been damaged'. Similarly, in the *Supreme Court Law Case* (Constitutional Court Decision No 004/PUU-I/2003, reviewing Law No 14 of 1985 on the Supreme Court, pp. 19–20), Judge Roestandi stated that the damage must be 'factual or real damage, not potential or predictive'.
43 *Bibit and Chandra Decision*, para 3.19.
44 *Bibit and Chandra Decision*, para 3.19.
45 For a detailed discussion of the constitutional implications the Constitutional Court has drawn from the *negara hukum* concept, see Butt (2007a).
46 *Bibit and Chandra Injunction*, para 3.18.
47 Constitutional Court Decision No 74–80–94–59–67/PHPU.C-VII/2009.
48 Constitutional Court Decision Nos 058–059–060–063/PUU-II/2004 and 008/PUU-III/2005, reviewing Law No 7 of 2004 on Water Resources.
49 Constitutional Court Decision No 31/PUU-IV/2006, reviewing Law No 32 of 2002 on Broadcasting.
50 Constitutional Court Decision No. 19/PUU-VI/2008, reviewing Law No 7 of 1989 on

the Religious Courts as amended by Law No 3 of 2006 on Amendments to Law No 7 of 1989 on the Religious Courts.
51 South Jakarta Public Prosecutor Cessation of Prosecution Orders No TAP-01/0.1.14/Ft.1/12/2009 (Chandra) and No TAP-02/0.1.14/Ft.1/12/2009 (Bibit) (Chalid *et al.* 2010: 3).
52 South Jakarta District Court Decision No 14/Pid.Prap/2010/PN.JKT.SEL.
53 Jakarta High Court Decision No 130 PID/Prap/2010/PT.DKI.
54 Corruption Court Order No 13/Pid.B/TPK/2010/PN.JKT.PST, 21 July 2010.

Conclusion: an uncertain future

1 Though the ACCL states that if the case is deemed significant, the Supreme Court Chief Justice can determine the number and judges and composition of the bench.
2 The Semarang ACC began operating on 3 January 2011 (Rofiuddin 2011). Seven ad hoc judges were installed at the Bandung District Court in late December and were set to begin work in January 2011 (*Jurnal Nasional* 2010).
3 The chairperson is to determine the composition of the panel within three days of receiving the case file, and the first hearing must take place within seven days of the composition of the panel being set (Article 27). The case must be decided within 120 working days of the case being handed to a first-instance ACC (Article 29); within 60 working days of appeal being lodged with a high ACC (Article 30); within 120 working days of a cassation application being lodged with the Supreme Court (Article 31); and within 60 days of a *peninjauan kembali* application being lodged (Article 32).

Postscript

1 Constitutional Court Decision No 5/PUU-IX/2011.
2 As discussed in Chapter 5, interim laws must be approved by the DPR at its next sitting to remain valid.
3 DPR decision No 01/DPR RI/II/2010–2011; Presidential Decision No 129/P of 2010 on the Appointment of Muhammad Busyro Muqoddas as Replacement KPK Commissioner and Chairperson.
4 See, for example, Constitutional Court Decisions No 069/2004; 14/PUU-VI/2008; 013/PUU-I/2003.
5 Constitutional Court Decision No 14/PUU-VI/2008.
6 Constitutional Court Decision No 14/PUU-VI/2008, pp. 279–80. For a more detailed discussion of this case, see Butt and Lindsey (2011).
7 See, for example, Constitutional Court Decisions No 001–021–022/PUU-I/2003; 013/PUU-I/2003.
8 Constitutional Court Decision No 49/PUU-VIII/2010. For more discussion about this case, see Butt and Lindsey (2011).
9 Constitutional Court Decision No 013–022/PUU-IV/2006.
10 Constitutional Court Decision No 110–111–112–113/PUU-VII/2009, p. 107.
11 Constitutional Court Decision No 5/PUU-IX/2011, p. 76.
12 The Constitutional Court's decision was handed down on 16 June; the 2011 amendments were enacted on 21 June.

Bibliography

ADB and OECD (2006) *Anti-corruption policies in Asia and the Pacific: progress in legal and institutional reform in 25 countries*, Manila, Philippines: Asian Development Bank.

Adji, I. (2001) *Korupsi dan hukum pidana*, 1st edn, Jakarta: Kantor Pengacara dan Konsultan Hukum Prof. Oemar Seno Adji & Rekan.

Akhmadi, H. (2010) *Breaking the Chains of Oppression of the Indonesian People*, USA: Equinox Publishing.

Alwie, T., Turido, S.F. and Widodo, M.S. (2010) 'KPK Perpu Ditolak, Tumpak Lengser', *Gatra*, March 18.

Antara News (2009) 'House to question police chief about Bibit-Chandra's detention', October 31.

Aprianto, A. and Nibono, E.A. (2010) 'Old Hand at the Helm', *Tempo English Edition*, December 7.

Aprianto, A. and Megarini, A. (2009) 'Masaro sends "signals"', *Tempo English Edition*, August 10.

Aspandi, A. (2002) *Menggugat Sistem Hukum Peradilan Indonesia Yang Penuh Ketidakpastian*, Surabaya: Lembaga Kajian Strategis Hukum Indonesia dan Lutfansah Mediatama.

Aspinall, E. (2005) *Opposing Suharto: compromise, resistance, and regime change in Indonesia*, Stanford CA: Stanford University Press.

Aspinall, E. and Fealy, G. (eds) (2003) *Local Power and Politics in Indonesia: Decentralisation and Democratisation*, Singapore: Institute of Southeast Asian Studies.

Assegaf, I. (2002) 'Legends of the Fall: An Institutional Analysis of Indonesian Law Enforcement Agencies Combating Corruption' in Lindsey, T. and Dick, H. (eds.), *Corruption in Asia: Rethinking the governance paradigm*, Annandale NSW: Federation Press.

Atmasasmita, R. (2009) 'Aspek Hukum RPP Penyadapan', *Harian Seputar Indonesia*, December 7.

Azfar, O., Lee, Y. and Swamy, A. (2001) 'The Causes and Consequences of Corruption', *The Annals of the American Academy of Political and Social Science* 573(1): 42–56.

Azly, E. (2009) 'News focus: president eventually issues Perpu on KPK interim chief', *Antara*, September 22.

Baskoro, L.H. (2009) 'Farming for corruption', *Tempo English Edition*, January 12.

Baksoro, L.H. and Kustiani, R. (2009) 'Antasari's Inquisition: 'Weak Charges and a Risky Article', *Tempo English Edition*, October 19.

Baskoro, L.H. and Sutarto (2010) 'Antasari's Final Round', *Tempo English Edition*, February 16.

BBC (2004) 'Suharto tops corruption rankings', March 25.

Bolongaita, E.P. (2010) *An exception to the rule? Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, Anti-corruption Resource Centre, August.

Budiartie, G. (2010a) 'Mengaku Tak Pilih Miranda, Endin Tetap Dapat Cek', *Tempo Interaktif*, March 21.

Budiartie, G. (2010b) 'Dudhie Makmun Murod Dituntut Tiga Tahun Penjara', *Tempo Interaktif*, April 26.

Budiman, A. (ed.) (1994) *State and Civil Society in Indonesia*, Clayton, Victoria: Centre of Southeast Asian Studies.

Buente, M. and Ufen, A. (eds) (2008) 'Government Policies and Civil Society Initiatives Against Corruption', in *Democratization in Post-Suharto Indonesia*, Hoboken: Taylor & Francis.

Buscaglia, E. and Dakolias, M. (1999) *An analysis of the causes of corruption in the judiciary*, Washington DC: World Bank.

Butt, S. (2003) 'Indonesia's Draft Criminal Code: can legal diversity exist within a single national law', *Alternative Law Journal* 28(6): 304.

Butt, S. (2007a) 'Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005', PhD dissertation, Law Faculty, Melbourne University.

Butt, S. (2007b) 'The Constitutional Court's decision in the dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?', in McLeod, R.H. and MacIntyre, A.J. (eds) *Indonesia: Democracy and the Promise of Good Governance*, Singapore: Institute of Southeast Asian Studies.

Butt, S. (2008a) 'Surat sakti: The decline of the authority of judicial decisions in Indonesia', in Lindsey, T. (ed.) *Indonesia: Law and Society*, 2nd edn, Annandale, NSW: Federation Press.

Butt, S. (2008b) 'Indonesian terrorism law and criminal process', Islam, Syari'ah and Governance Background Paper Series, ARC Federation Fellowship, University of Melbourne.

Butt, S. (2009a) 'Two at the top: the Constitutional Court and the Supreme Court', *Van Zorge Report on Indonesia* XI 8: 12–20.

Butt, S. (2009b) ''Unlawfulness' and corruption under Indonesian law', *Bulletin of Indonesian Economic Studies* 45: 179–98.

Butt, S. (2010) 'Islam, the state and the Constitutional Court in Indonesia', *Pacific Rim Law & Policy Journal* 19(2): 279–301.

Butt, S. (2010a) 'Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms', *Sydney Law Review* 32: 177–97.

Butt, S. (2010b) 'Indonesia's New Anti-Corruption Court Law: Translation and Commentary', *Australian Journal of Asian Law* 11: 302–30.

Butt, S. and Hansell, D. (2004) 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003', *Australian Journal of Asian Law* 6: 176–96.

Butt, S. and Lindsey, T. (2008) 'Economic reform when the Constitution matters: Indonesia's Constitutional Court and Article 33', *Bulletin of Indonesian Economic Studies* 44: 239–62.

Butt, S. and Lindsey, T. (2010a) 'Judicial Mafia: The Courts and State Illegality in Indonesia', in van Klinken, G. and Aspinall, E. (eds), *The state and Illegality in Indonesia*, Leiden: KITLV Press.

Butt, S. and Lindsey, T. (2010b) 'Unfinished Business: Law Reform, Governance and the Courts in Post-Soeharto Indonesia', in Künkler, M. and Stepan, A. (eds) *Indonesia, Islam and Democratic Consolidation*, Columbia University Press (forthcoming).

Butt, S. and Lindsey, T. (2011) 'The Indonesian Constitution: A Contextual Analysis', Oxford: Hart (forthcoming).

Carnegie, P. (2008) 'Democratization and decentralization in post-Soeharto Indonesia: Understanding transition dynamics', *Pacific Affairs* 81: 515–25.

Case, W. (2009) 'Low-quality democracy and varied authoritarianism: elites and regimes in Southeast Asia today', *The Pacific Review* 22: 255–69.

Chalid, H. (2001) 'A Personal Experience in Combating Corruption: The Indonesian Supreme Court's Wrongful Dissolution of the Joint Investigating Team Against Corruption', October 17, Asian Law Centre, Melbourne University.

Chalid, H., Syarif, M.L., Sirait, N.N., Santoso, T., Hiariej, E. and Mukantarjo, R.S. (2010) *Amici Curiae: kepada Mahkamah Agung Republik Inonesia dalam Perkara Peninjauan Kembali antara Kejaksaan Agung Republik Indonesia melawan Putusan Pengadilan Tinggi DKI JKT Nomor 130 PID/PRAP/2010/PT.DKI*, 3 June 2010.

Christanto, D. (2009) 'Bibit, Chandra attend hearing after release from detention', *Jakarta Post*, November 5.

Colmey, J. and Liebhold, D. (1999) 'Suharto Inc: the Family Firm', *Time Asia*, May 24.

Crouch, M. (2008) 'Indonesia's national and local Ombudsman reforms: Salvaging a failed experiment?', in Lindsey, T. (ed.) *Indonesia: Law and Society*, 2nd edn, Annandale NSW: Federation Press.

Dakolias, M. and Thachuk, K. (2000) 'Attacking corruption in the judiciary: a critical process in judicial reform', *Wisconsin International Law Journal* 18: 353–406.

David, R. and Brierley, J.E.C. (1985) *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3rd edn, London: Stevens.

Davidson, J. (2009) 'Dilemnas of democratic consolidation in Indonesia', *The Pacific Review* 22: 293–310.

Dawson, J.P. (1994) *The Oracles of the Law*, New York: Legal Classics Library.

de Vrey, R.W. (2006) *Towards a European Unfair Competition Law: A Clash Between Legal Families: A Comparative Study of English, German and Dutch Law in Light of Existing European and International Legal Instruments*, Leiden: Martinus Nijhoff.

de Ferranti, D. Jacinto, J., Ody, A. and Ramshaw, G. (2009) *How to Improve Governance: a new framework for analysis and action*, Washington DC: Brookings Institution Press.

Detikcom (2005) 'Tipikor Tetap Gunakan Hukum Materiil Pidanakan Theo', August 25.

Detiknet (2006) 'Konsekuen Putusan MK, Rusadi Kantaprawira Minta Dibebaskan', July 31.

Dhyatmika, W., Hadad, T., Damayanti, N., Taufiq, R., and Taufik, M. (2009) 'How to cage a "house lizard" ', *Tempo English Edition*, November 16.

Dhyatmika, W., Handayani, A.L., Kustiani, R. and Munawaroh, R. (2009) 'Ganging up on the KPK', *Tempo English Edition*, July 13.

Diansyah, F. (2009) *Weakening of Corruption Eradication Commission (KPK) in Indonesia: Independent Report*, Doha, Qatar: Indonesia Corruption Watch/National Coalition of Indonesia for Anticorruption, November.

Djani, L. (2008) 'Inside Yudhoyono's anti-corruption machine', *Inside Indonesia* August–October.

Dwidjo, M. and Setyarso, T. (2009) 'Two cups for the President', *Tempo English Edition*, November 16.

Economist (2009) 'A deep-rooted habit; the difficulty of battling graft', September 10.

Elders, J.L.M. and Woretshofer, J. (1992) 'Euthanasia in the Netherlands: current court decisions and legislation' in Alexander, G. (ed.) *International perspectives on aging*, Dordrecht; Boston; Norwell MA: M. Nijhoff.

Emmerson, D. (2010) 'Exit Sri Mulyani: Corruption and reform in Indonesia', *East Asia Forum*, May 9.

Fenwick, S. (2008) 'Measuring Up? Indonesia's Anti-Corruption Commission and the new corruption agenda', in Lindsey, T. (ed.) *Indonesia: Law and Society*, 2nd edn, Annandale, NSW: Federation Press.

Fitzpatrick, D. (2008) 'Culture, Ideology and Human Rights: The Case of Indonesia's Code of Criminal Procedure' in Lindsey, T. (ed.) *Indonesia: Law and Society* 2nd edn, Annandale, NSW: Federation Press.

Fitzpatrick, D. (1977) 'Disputes and Pluralism in Modern Indonesian Land Law', *Yale Journal of International Law*, 22(1): 171–212.

Forbes, M. (2008) 'Jakarta fraud sleuth arrested', *The Age*, March 4.

Gatra (2006) 'Pengadaan Tinta Pemilu: Rusadi Mengaku Tak Ada Yang Salah', *Gatra*, February 9.

Goodpaster, G. (2002) 'Reflections on Corruption in Indonesia', in Lindsey, T. and Dick, H.W. (eds), *Corruption in Asia: rethinking the governance paradigm*, Annandale, NSW: Federation Press.

Guerin, B. (2006) 'Indonesia wins one in war on corruption', *Asia Times Online*, January 31.

Hadiz, V. (2008) 'How far to meaningful democracy (2)', *Inside Indonesia* 92: Apr–Jun.

Hadiz, V. (2004) 'Decentralization and Democracy in Indonesia: A Critique of Neo-institutionalist Perspectives', *Development and Change* 35: 697–718.

Hadiz, V. and Robinson, R. (2005) 'Neo-liberal Reforms and Illiberal Consolidations: The Indonesian Paradox', *The Journal of Development Studies* 41: 220–41.

Hamzah, A. (1984) '*Korupsi Di Indonesia: Masalah Dan Pemecahannya*', Jakarta: Gramedia.

Handayani, A.L. and Aprianto, A. (2009) 'When One Equals None', *Tempo English Edition*, October 26.

Handayani, A.L., Aprianto A., Muh, I., and Wibowo, E.A. (2009) 'Pulling the tiger's teeth', *Tempo English Edition*, September 28.

Handayani, A.L, Kustiani, R. and Nilawaty, C. (2009) 'Tragedy of the Dapper Prosecutor', *Tempo English Edition*, May 11.

Harahap, Y. (2000) *Pembahasan permasalahan dan penerapan KUHP: Pemeriksaan siding pengadilan, banding, kasasi dan peninjauan kembali*, 2nd edn, Jakarta: Sinar Grafika.

Haryadi, R. (2009) *Chandra-Bibit; Membongkar Perseteruan KPK, Polri, dan Kejaksaan*, Jakarta: Hikmah.

Hiariej, E. (2006) 'Memahami Sifat Melawan Hukum', *Kompas*, August 3.

Hidayat, B. and Febriyan (2011) 'Go to jail … directly to jail', *Tempo English Edition* (February 15).

Hidayat, B., Parera, P., Galih, B. and Ekawati, A. (2008) 'No Light at the End of the Tunnel', *Tempo English Edition*, February 25.

Hosen, N. (2010) *Human rights, politics and corruption in Indonesia: a critical reflection on the post Soeharto era*, Republic of Letters.

Hotland, T. and Taufiqurrahman, M. (2008) 'SBY Rallies Anti-Graft Drive, but Warns Against Excess', *Jakarta Post*, December 12.

Hukumonline (2004) 'Pengacara Puteh Persoalkan Asas Retroaktif', December 8.

Hukumonline (2005a) 'Putusan UU KPK, Warning Bagi MK Agar Lebih Hati-Hati', February 25.

Hukumonline (2005b) 'Dua Hakim Karir Dissenting Opinion Kewenangan KPK', April 12.
Hukumonline (2005c) 'Hakim Karir Lagi-Lagi Bebaskan Terdakwa Korupsi', April 25.
Hukumonline (2005d) 'Apa Kabar Perkara Bram Manoppo?', May 30.
Hukumonline (2005e) 'Vonis Banding, Hakim Perintahkan Puteh Masuk Tahanan', June 17.
Hukumonline (2005f) 'Dua Hakim Karir Dissenting Opinion, Perkara Bram Manoppo Dilanjutkan', June 23.
Hukumonline (2005g) 'Rusadi Didakwa Melanggar Kepres Pengadaan Barang dan Jasa', October 12.
Hukumonline (2005h) 'Divonis tujuh tahun, Nazaruddin Nyatakan Pemilu Harus Diulang', December 15.
Hukumonline (2006a) 'Saksi Ahli: Walau Metodenya Benar, Prosedur Pengadaan Tinta Pemilu Salah', January 20.
Hukumonline (2006b) 'Jabatan Guru Besar Ilmu Hukum, Memberatkan Posisi Rusadi', February 3.
Hukumonline (2006c) 'Achmad Rojadi Susul Rusadi Kantaprawira', May 16.
Hukumonline (2006d) 'Suparman Didakwa Peras Saksi Lebih Dari Rp 413 Juta', May 30.
Hukumonline (2006e) 'Pengacara Theo Masukkan Putusan MK dalam Nota Pembelaan', August 8.
Hukumonline (2008a) 'Akhirnya, DPR Persilahkan KPK Menggeledah', April 26.
Hukumonline (2008b) 'Urip Mengaku Bersalah', August 14.
Hukumonline (2008c) 'Urip Tetap Dihukum 20 Tahun Penjara', November 29.
Hukumonline (2009a) 'DPR dan (anti) korupsi 'sehidup semati': catatan awal tahun 2009', January 1.
Hukumonline (2009b) 'DPR dan (anti) korupsi 'sehidup semati': catatan awal tahun 2009', January 5.
Hukumonline (2009c) 'Vonis Hamka dan Antony Tidak Seragam: Aliran dana BI', January 7.
Hukumonline (2009d) 'Kasasi Urip Tri Gunawan Ditolak MA', March 11.
Hukumonline (2009e) 'KPK: Isi Testimoni Antasari Diragukan Kebenarannya', August 7.
Hukumonline (2009f) 'Penyalahgunaan Wewenang KPK Seharusnya Diuji di Praperadilan', September 17.
Hukumonline (2009g) 'Presiden Harus Turun Tangan Atasi Kemelut Polri-KPK', September 21.
Hukumonline (2009h) 'LSM dan Sejumlah Tokoh Tolak Perpu Plt Pimpinan KPK', September 28.
Hukumonline (2009i) 'Bibit-Chandra Akan Bebas dari Jerat Hukum', November 30.
Hukumonline (2009j) 'RPP Penyadapan Hambat Pemberantasan Korupsi', December 5.
Hukumonline (2009k) 'KPK Tolak Izin Pengadilan Terkait Penyadapan', December 7.
Hukumonline (2010a) 'Istri Irawady Joenoes Ajukan PK', January 7.
Hukumonline (2010b) 'Awal Pekan Depan Dudhie Makmum Murod Disidang', March 5.
Hukumonline (2010c) 'Misteri Empat Kantong Belanja di Meja Kerja Nunun', March 12.
Hukumonline (2010d) 'Alasan Kemanusiaan, Hukuman Irawady Joenoes Dikorting', March 19.
Hukumonline (2010e) 'Praperadilan Anggodo Dikabulkan', April 19.
Hukumonline (2010f) 'Kejaksaan Banding atas Praperadilan SKPP Bibit-Chandra', April 21.

Hukumonline (2010g) 'DPR Desak KPK Hentikan Penyidikan', April 28.
Hukumonline (2010h) 'KPK Bagi Informasi Perkara Century dengan Polri', May 14.
Hukumonline (2010i) 'MK Merasa Tak Berwenang Hentikan Kasus Susno', August 19.
Hukumonline (2010j) 'Dua Berkas Perkara Susno Siap Dilimpahkan ke Pengadilan', August 25.
Hukumonline (2010k) 'Pengadilan Umum, Surga Pembebas Koruptor', September 6.
Hukumonline (2010l) 'Berita Acara Pemeriksaan Bukan Alat Bukti Surat', September 14.
Hukumonline (2010m) 'Jaksa Tetap Berkeyakinan BAP sebagai Alat Bukti', September 16.
Hukumonline (2010n) 'MA Tantang ICW Uji Data Vonis Kasus Korupsi', September 20.
Hukumonline (2010o) 'MA Tolak Kasasi Antasari Azhar', September 22.
Hukumonline (2010p) 'MK: Masa Jabatan Jaksa Agung Konstitusional Bersyarat', September 22.
Hukumonline (2010q) 'Mahfud MD: Hendarman Supandji Harus Berhenti', September 22.
Hukumonline (2010r) 'Permohonan Judicial Review Susno Kandas', September 25.
Hukumonline (2010s) 'Throwing stones in glass houses? Allegations of corruption within Indonesia's corruption eradication commission: The KPK under siege', September 28.
Hukumonline (2010t) 'Kasus Rekayasa Bibit-Chandra Pengaruhi Kinerja KPK', October 11.
Hukumonline (2010u) 'MA Luruskan Data Vonis Bebas Korupsi Milik ICW', November 19.
Hukumonline (2010v) 'Ombudsman: Sudah Tertatih-Tatih, Digugat Pula', December 20.
Hukumonline (2011a) 'MA Kesulitan Jaring Calon Hakim Adhoc Tipikor', January 16.
Hukumonline (2011b) 'Antasari Jadikan Keterangan Gayus Sebagai Alasan PK', January 20.
Hukumonline (2011c) 'Pertama Kali Kasus Kejaksaan Disidang di Pengadilan Tipikor Jakarta', January 31.
Hukumonline (2011d) 'Seluruh Perkara Korupsi Diadili di Pengadilan Tipikor', February 1.
Hukumonline (2011e) 'Pengadilan Tipikor Sidangkan Ketua Dewan Kelurahan', February 7.
Hukumonline (2011f) 'Deponeering Bibit-Chandra: MK Tolak Beri Pendapat Hukum', February 10.
Hukumonline (2011g) 'Jaksa Dwi Seno Diusulkan Diberhentikan Sementara', February 14.
Hukumonline (2011h) 'Pengadilan Tipikor Jakarta Bebaskan Seorang Terdakwa', February 21.
Hukumonline (2011i) 'Tunggu Masukan Masyarakat, RUU Tipikor Ditarik', April 1.
Hukumonline (2011j) 'Revisi UU KPK Tak Terbendung', April 25.
Hukumonline (2011k) 'MK Legowo Sambut UU Baru', June 22.
Husodo, A.T. (2010) 'Challenges in combating corruption: Lessons from Indonesia', *Indonesia Corruption Watch*, March 29.
ICW (2001) *Menyingkap Tabir Mafia Peradilan (Hasil Monitoring Peradilan ICW)*, Jakarta: Indonesian Corruption Watch.
ICW (2008) 'Pengadilan umum: 'kuburan' pemberantasan korupsi', Indonesia Corruption Watch.
ICW (2009) 'Tolak RPP Penyadapan: Babak Baru Upaya Melemahkan KPK', Indonesia Corruption Watch press conference, December.

inilah.com (2009) 'Ketua MK: RPP Penyadapan Depkominfo Salah', *inilah.com*, December 16.
Isra, S. (2010) 'Serangan Balik Anggodo Kepada Bibit-Chandra', *Jawa Pos*, April 29.
Jakarta Globe (2010) 'Land Case under Scrutiny over Judicial Bribery Claims', March 31.
Jakarta Globe (2011) 'She Made a Joke of Justice System. Where Is Our Pride?', January 29.
Jakarta Post (2001) 'Adi Andojo resigns from the anti-corruption team', March 28.
Jakarta Post (2004a) 'After box crisis, comes ink snag', February 7.
Jakarta Post (2004b) 'Ink bidders' funds doubted', February 12.
Jakarta Post (2004c) 'Commission decides not to re-tender for ink', February 14.
Jakarta Post (2005a) 'BPK suspects corruption at KPU', April 21.
Jakarta Post (2005b) 'Audit report indicates massive corruption at KPU', April 23.
Jakarta Post (2005c) 'Poll commission chief charged with corruption', August 9.
Jakarta Post (2005d) 'KPK member could face life sentence for graft', October 13.
Jakarta Post (2006) 'Tomy Winata quizzed over corruption allegations', November 30.
Jakarta Post (2008a) 'Judicial watchdog member jailed for accepting bribe', March 15.
Jakarta Post (2008b) 'Urip denies taking bribe but judges don't buy it', June 12.
Jakarta Post (2008c) 'Lawmaker Al Amin faces bribery, extortion charges', August 26.
Jakarta Post (2008d) 'Al Amin faces multiple charges', August 27.
Jakarta Post (2009) ''Gecko Vs Crocodile', 2009', November 24.
Jakarta Post (2010a) 'Pressure on KPK to probe BLBI case intensifies', April 1.
Jakarta Post (2010b) 'KPK Vows to find bribe payers sans Nunun', October 16.
Jakarta Post (2010c) 'Hero or not, few miss Soeharto's rule: Poll', October 23.
Jakarta Post (2010d) 'Bibit-Chandra saga may take a new turn', October 26.
Jakarta Post (2010e) 'KPK should get second opinion on Nunun's health: Doctor', December 9.
Jakarta Post (2010f) 'Komnas to probe Antasari trial process', December 31.
Jakarta Post (2011a) 'Chief justice: All provinces will have corruption courts by year end', February 17.
Jansen, D. (2010) 'Snatching victory', *Inside Indonesia* 100: June.
Jasin, M. (2010) 'The Indonesian Corruption Eradication Commission', in *A consultation on corruption and counter-corruption across Asia*, Kowloon: Asian Legal Resource Centre.
Joko P. (1988) *Alat bukti dan kekuatan pembuktian di dalam proses pidana*, Yogyakarta: Liberty.
Jurnal Konstitusi (2009) 'Editorial', *Jurnal Konstitusi* 34: 4.
Jurnal Nasional (2010) 'Pengadilan Tipikor Jawa Barat Mulai Bekerja Januari 2011', *Jurnal Nasional*, December 29.
Kian, W.T. (2008) 'Indonesia's Economic Development During and after the Soeharto Era: Achievements and Failings', Paper presented at 'Asian Experiences of Economic Development and Their Policy Implications for Africa', JICA and JBIC: Tokyo, February 5–6.
Klitgaard, R. (1988) *Controlling corruption*, Berkeley: University of California Press.
Komisi Pemberantasan Korupsi (2004) *Laporan Tahunan Komisi Pemberantasan Korupsi 2004*, Jakarta: Komisi Pemberantasan Korupsi.
Komisi Pemberantasan Korupsi (2005) *Laporan Tahunan Komisi Pemberantasan Korupsi 2005*, Jakarta: Komisi Pemberantasan Korupsi.
Komisi Pemberantasan Korupsi (2006) *Laporan Tahunan Komisi Pemberantasan Korupsi 2006*, Jakarta: Komisi Pemberantasan Korupsi.

Komisi Pemberantasan Korupsi (2007) *Laporan Tahunan Komisi Pemberantasan Korupsi 2007: Empowering Law Enforcement*, Jakarta: Komisi Pemberantasan Korupsi.

Komisi Pemberantasan Korupsi (2008) *Laporan Tahunan Komisi Pemberantasan Korupsi 2008: Public Services Optimalised*, Jakarta: Komisi Pemberantasan Korupsi.

Komisi Pemberantasan Korupsi (2009) *Laporan Tahunan KPK 2009: Perjuangan Melawan Korupsi Tak Pernah Berhenti*, Jakarta: Komisi Pemberantasan Korupsi.

Kompas (2005) 'Pengadilan tinggi tipikor vonis Theo Toemion 6 Tahun', *Kompas*, November 16.

Kompas (2007a) 'Pengadilan Pilihan Koruptor', *Kompas*, February 6.

Kompas (2007b) 'Pengadilan Pilihan Koruptor', *Kompas*, February 6.

Kompas (2008a) 'Irawady Joenoes Divonis Hari Ini', *Kompas*, March 14.

Kompas (2008b) 'Irawady Joenoes Divonis 8 Tahun', *Kompas*, March 14.

Kompas (2009a) *Jangan Bunuh KPK: Perlawanan terhadap Usaha Pemberantasan Korupsi*, 2nd edn, Jakarta: Penerbit Buku Kompas.

Kompas (2009b) 'Hamka divonis 3 tahun, Antony 4,5', *Kompas*, January 8.

Kompas (2009c) 'Kasasi Urip Tri Gunawan Ditolak', *Kompas*, March 11.

Kompas (2009d) 'Inilah Dokumen Lengkap Rekomendasi Tim Delapan', *Kompas*, November 17.

Kong, T. and Ramayandi, A. (2008) 'Survey of recent developments', *Bulletin of Indonesian Economic Studies* 44: 7–32.

van Koppen, P. (1990) 'The Dutch Supreme Court and Parliament: Political decision-making versus non-political appointments', *Law and society review* 24: 745–81.

Koran Tempo (2005) 'Ajukan Pertimbangan MK, Puteh Minta Dibebaskan', February 17.

Koran Tempo (2007) 'Serangan Balik Koruptor Jilid II', December 28.

KPPU (2005) 'Supplying Finger Print Ink for Public Election: Announcement of Decision', Komisi Pengawas Persaingan Usaha, July 11.

Kustiani, R. (2008) 'The Prosecutor's Last Act', *Tempo English Edition*, September 15.

Kustiani, R., Aprianto, A., Ari, E. and Sutarto (2009) 'A 'middle of the road' policy', *Tempo English Edition*, October 12.

Kustiani, R., Syafire, F., and Septian, A. (2009) 'Travel ban trouble', *Tempo English Edition*, September 28.

Lasser, M. (2004) *Judicial Deliberations: a comparative analysis of judicial transparency and legitimacy*, Oxford; New York: Oxford University Press.

Lev, D.S. (1978) 'Judicial authority and the struggle for an Indonesian rechsstaat', *Law and Society Review* 13: 37–71.

Lev, D.S. (1999) 'The Criminal Regime: Criminal Process in Indonesia', in Rafael, V. (ed.) *Figures of Criminality in Indonesia, the Philippines, and Colonial Vietnam*, New York: Ithaca.

Liddle, W. (2002) 'Indonesia's Democratic Transition: Playing by the Rules', in Reynolds, A. (ed.) *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, Oxford; New York: Oxford University Press.

Lindsey, T. (2000) 'Black Letter, Black Market and Bad Faith: Corruption and the Failure of Law Reform', in Manning, C. and van Diermen, P. (eds) *Indonesia in Transition: Social Aspects of Reformasi and Crisis*.

Lindsey, T. (2001) 'The Criminal State: Premanisme and the New Indonesia', in Lloyd G. and Smith, S.L. (eds) *Indonesia Today: Challenges of History*, Singapore: SEAS.

Lindsey, T. (2002) 'Indonesian Constitutional Reform: Muddling Towards Democracy', *Singapore Journal of International and Comparative Law* 6: 244–301.

Lindsey, T. and Dick, H. (eds) (2002) *Corruption in Asia: Rethinking the Governance Paradigm*, Annandale NSW: Federation Press.

Lubis, T. (1993) *In Search of Human Rights: legal-political dilemmas of Indonesia's New Order, 1966–1990*, Jakarta: PT Gramedia Pustaka Utama.

Mahbubirrahman, N. (2010) 'Udju Djuhaeri dituntut 3 tahun penjara', *PrimairOnline*, April 26.

Manggiasih, B. (2010) 'Dudhie Makmun Murod Terancam Penjara Lima Tahun', *Tempo Interaktif*, March 8.

Masyarakat Transparansi Indonesia (2000a) 'Tim Gabungan Pemberantasan Korupsi Bukan Sekadar "Tong Sampah" dan "Bumper"', *Jurnal Transparansi* 26.

Masyarakat Transparansi Indonesia (2000b) Beberapa Tim Antikorupsi yang pernah Dibentuk (1967–2000) *Jurnal Transparansi* 26.

Mauro, P. (1995) 'Corruption and Growth', *The Quarterly Journal of Economics* 110(3): 681.

McLeod, R. (2000) 'Soeharto's Indonesia: A Better Class of Corruption', *Agenda* 7: 99–112.

Merkel, W. and Croissant, A. (2004) 'Conclusion: good and defective democracies', *Democratization* 11: 199–213.

Merryman, J. (1984) *The Civil Law Tradition: an introduction to the legal systems of Western Europe and Latin America.* Stanford California: Stanford University Press.

Mietzner, M. (2009a) *Military Politics, Islam and the State in Indonesia: from turbulent transition to democratic consolidation*, Singapore: Institute of Southeast Asian Studies.

Mietzner, M. (2009b) 'Indonesia and the Pitfalls of Low-Quality Democracy: A Case Study of the Gubernatorial Elections in North Sulawesi', in Ufen, A. and Bunte, M. (eds) *Democratization in Post-Suharto Indonesia*, London; New York: Routledge.

Ombudsman Republik Indonesia (2010) *Laporan Tahunan 2009: Ombudsman Republik Indonesia*, Ombudsman Republik Indonesia: Jakarta.

Palmier, L. (1985) *The control of bureaucratic corruption: case studies in Asia*, New Delhi: Allied Publishing Private Limited.

Parera, P., Aprianto, A., Maksum, D.U. and Desyana, C. (2010) 'Holding the Trump Card', *Tempo English Edition*, January 26.

Pasandaran, C. (2009) 'Tapes Reveal Death Threat against KPK's Chandra', *Jakarta Globe*, November 4.

Pearson, Zoe (2001) 'An International Human Rights Approach to Corruption', in Larmour, P. and Wolanin, N. (eds) *Corruption and anti-corruption*, Canberra: Asia Pacific Press.

Pemberton, J. (1999) 'Open Secrets: Excerpts from Conversations with a Javanese Lawyer, and a Comment', in Rafael, V. and Mrázek, R. (eds) *Figures of criminality in Indonesia, the Philippines, and Colonial Vietnam*, Ithaca NY: Southeast Asia Program Cornell University.

Pengacara Online (2010) 'Kinerja KPK Dinilai Menurun, August 5.

Pompe, S. (2005) *The Indonesian Supreme Court: A Study of Institutional Collapse*, Ithaca NY: Southeast Asia Program, Cornell University.

Prakoso, J. (1998) *Alat bukti dan kekuatan pembuktian di dalam proses pidana*, Yogyakarta: Liberty.

Pratama, F. (2010) 'KPK Jadwalkan Periksa Anggoro Widjojo dalam Kasus Korupsi SKRT' *Detikcom*, October 25.

Pratikno (2005) 'Exercising freedom: Local autonomy and democracy in Indonesia 1999–2001', in Sulistiyanto, P., Erb, M. and Faucher, C. (eds) *Regionalism in Post-Suharto Indonesia*, USA: RoutledgeCurzon.

Ramage, D. (1993), *Ideological Discourse in the Indonesian New order: State Ideology and the Beliefs of an Elite*, *1985–1993*, PhD thesis, Ann Arbor: University of South Carolina.

Ramage, D. (2007) 'Indonesia: Democracy First, Good Governance Later', *Southeast Asian Affairs*: 135–60.

Ramidi (2010) 'Stamp of disapproval', *Tempo English Edition*, March 16.

Ramidi and Savitri, I. (2009) 'The Bibit-Chandra option', *Tempo English Edition*, November 9.

Ramidi, Desyana, C. and Nilawaty, C. (2009) 'Repeated condemnation', *Tempo English Edition*, October 12.

Ramidi, Handayani, A. L., Kustiani, A. and Septian, A. (2009) 'Exposing manipulation', *Tempo English Edition*, November 9.

Ramidi, Kustiani, R., Wahid, I., Primatantyo, U. and Munawaroh (2009) 'Antasari's Golf Hazard', *Tempo English Edition*, May 11.

Rayda, N. (2009a) 'KPK Resumes Pursuit of Indonesian Graft Suspect Anggoro', *Jakarta Globe*, May 5.

Rayda, N. (2009b) 'KPK Deputy Denounces Criminal Charges', *Jakarta Globe*, August 18.

Rayda, N. (2010a) 'Anggodo Widjojo Jailed for 4 Years for Attempted Bribery', *Jakarta Globe*, August 31.

Rayda, N. (2010b) 'KPK Explores Options to Prosecute Businesswoman in Bank Indonesia Bribery Case', *Jakarta Globe*, September 21.

Remmelink, J. (2003) *Hukum Pidana: Komentar atas pasal-pasal terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, Jakarta: Gramedia Pustaka Utama.

Robertson-Snape, F. (1999) 'Corruption, Collusion and Nepotism in Indonesia', *Third World Quarterly* 20: 589–602.

Roestandi, A. (2006) 'Peran dan Pelaksanaan Putusan Mahkamah Konstitusi', *Jurnal Konstitusi* 3: 7.

Rofiuddin (2011). 'Pengadilan Tipikor Semarang Mulai Tangani Perkara', *Tempo Interaktif*, January 3.

Royan, N. (2008) 'Increasing press freedom in Indonesia: The abolition of the Lese Majeste and 'Hate-sowing' Provisions', *Australian Journal of Asian Law* 10(2): 290.

Rose-Ackerman, S. (1997a) 'The Political Economy of Corruption', in Elliot, K. (ed.) *Corruption and the global economy*, Washington DC: Institute for International Economics.

Rose-Ackerman, S. (1997b) 'The role of the World Bank in controlling corruption', *Journal of Law and Policy in International Business* 29: 93–114.

Rose-Ackerman, S. (1999) *Corruption and Government: Causes, Consequences, and Reform*, New York: Cambridge University Press.

Sagita, D. and Antara (2010) 'Indonesian Government Slaps Travel Ban on BI's Miranda', *Jakarta Globe*, November 17.

Sapardjaja, K. (2002) *Ajaran sifat melawan hukum materiel dalam hukum pidana Indonesia: studi kasus tentang penerapan dan perkembangannya dalam yurisprudensi*, Bandung: Alumni.

Sasangka, H. and Rosita, L. (2003) *Hukum pembuktian dalam perkara pidana: untuk mahasiswa dan praktisi*, Bandung: Mandar Maju.

Schütte, S.A. (2011) 'Appointing top officials in democratic Indonesia: the case of the Corruption Eradication Commission', *Bulletin of Indonesian Economic studies* (forthcoming).

Schwarz, A. (1994) *A Nation in Waiting: Indonesia in the 1990s*, Boulder Colorado: Westview Press.

Schwarz, A. (2000) *A Nation in Waiting: Indonesia's search for stability*, 2nd edn, Boulder Colorado: Westview Press.

Septian, A. (2011) 'Locked up by his 'enemies'', *Tempo English Edition*, February 15.

Sherlock, S. (2002) 'Combating Corruption in Indonesia? The Ombudsman and the Assets Auditing Commission', *Bulletin of Indonesian Economic Studies* 38(3): 367.

Siahaan, A. and Rachman, A. (2010) 'Miranda Travel Ban Leaves Many Lawmakers Unsatisfied', *Jakarta Globe*, November 19.

Silalahi, Mustafa (2011) `Pengadilan Tindak Pidana Korupsi: Sederhana Membawa Bebas', *Tempo*, March 7.

Sinar Harapan (2005) 'Implikasi Putusan MK Terdakwa Kasus Korupsi Berpeluang Bebas', February 16.

Stockmann, P. (2007) *The New Indonesian Constitutional Court: A study into its beginnings and first years of work*, Jakarta: Hanns Seidel Foundation.

Subekti, R. (2003) *Hukum pembuktian*, Jakarta: Pradnya Paramita.

Sunudyantoro and Kukuh, S.W. (2009) 'Susno's exploits', *Tempo English Edition*, November 23.

Syamsuddin, A. (2007) 'Benarkah KPK Tidak Pernah Bersalah*?'*, *Kompas*, February 27.

Tempo (1977) 'Mereka Dapat 6–8 Tahun', September 28.

Tempo (2005) 'Kontroversi Sebutir Pertimbangan', February 21.

Tempo (2006) 'Rusadi Kantaprawira Divonis Empat Tahun Penjara', February 17.

Tempo (2009) 'Susno Duadji: Cicak Kok Mau Melawan Buaya', July 6.

Tempo (2010) 'Udju Djuhaeri Dihukum Dua Tahun Penjara', May 17.

Tempo English Edition (2008) 'Burhanuddin Abdullah: Let us Seek a Fair Solution', February 25.

Tempo English Edition (2009a) 'The President should dare to be out of the box', November 16.

Tempo English Edition (2009b) 'Simply Gaining the Upper Hand', November 23.

Tempo English Edition (2010a) 'Cover Story: Day of Reckoning', February 16.

Tempo English Edition (2010b) 'Opinion: Day of Reckoning', February 16.

Tempo English Edition (2010c) 'Mafia at the gates', March 16.

Tempo English Edition (2010d) 'Superficial politicking', March 30.

Tempo English Edition (2010e) 'High Court Rejects Antasari Appeal', June 29.

Vickers, A. (2005) *A History of Modern Indonesia*, Cambridge: Cambridge University Press.

Wagner, B.B., and Jacobs, L.G. (2008) 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations', *University of Pennsylvania Journal of International Economic Law* 30: 183–266.

Waluyo, D. and Himawan, I.Q. (2002) 'Terjebak Rumah Siluman', *Gatra*, October 7.

Wardany, I. (2009) 'Public courts toothless in graft fight, say watchdogs', *Jakarta Post*, January 5.

Wardany, I. (2010) 'KPK motors ahead with BLBI loan probe', *Jakarta Post*, January 21.

Webber, D. (2006) 'A consolidated patrimonial democracy? Democratization in post-Suharto Indonesia', *Democratization* 13: 396–420.

Weiss, M. (2007) 'What a Little Democracy Can Do: Comparing Trajectories of Reform in Malaysia and Indonesia', *Democratization* 14: 26–43.

World Bank (1994) *The East Asian Miracle: economic growth and public policy*, New York: Oxford University Press.

World Bank (2004a) *Combating Corruption in Indonesia: enhancing accountability for development*, Jakarta: World Bank Office Jakarta.

World Bank (2004b) *Village Justice in Indonesia: Case studies on access to justice, village democracy and governance*, Jakarta: World Bank.

Wright, T. (2009) 'Indonesia Dilutes Antigraft Court', *Wall Street Journal*, September 30.

Wrighter, S. (2005) 'Questions of judgement: the new Constitutional Court combines law and politics', *Inside Indonesia* 81.

Yunto, E. (2005) 'Tim Koordinasi Pemberantasan Korupsi: Antara Harapan dan *Kekhawatiran*', Masyarakat Pemantau Peradilan Indonesia.

Yunto, E. (2008) 'Mencermati Pemberian SP3 Kasus Korupsi', *Hukumonline*, November 25.

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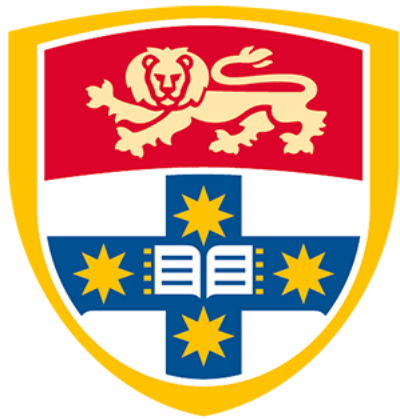

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Indonesia has transformed from one of South East Asia's most repressive and centralised political systems to its most decentralised and democratic. Despite this, obstacles still remain that hinder Indonesia achieving the 'rule of law', and in particular, the country is consistently ranked as having one of the highest levels of corruption in the world. This book assesses Indonesia's anti-corruption reforms over the past decade, focusing on the Anti-corruption Commission (KPK) and the Anti-corruption Court (ACC).

The book discusses how both institutions have been largely successful since they began operating on 2004. Before 2008, the KPK and ACC largely focused on mid-senior level targets and faced resistance primarily in the form of constitutional challenges to their jurisdictions and powers. From 2008, however, the KPK began targeting politically-powerful figures, drawing resistance that now threatens the future efficacy of both institutions. It is largely in Indonesia's courtrooms and lawmaking institutions that key battles between reformists and those preferring the status quo have played out. This book describes and analyses these judicial processes and legal changes. It shows that despite persistent claims that Indonesia's legal system is dysfunctional, law is far from irrelevant in modern day Indonesia. The book is a useful contribution to South East Asian politics and Asian law.

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